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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

On Appeal from the United States District Court for the Eastern District of New York

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Submitted on Behalf of All Parties

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APPENDIX F — SETTLEMENT CLASS NOTICES

APPENDIX F1

POST CARD NOTICE

To all individuals and businesses that accept American Express cards: Notice of a class action settlement

Si desea recibir esta notificación en español, llámenos o visite nuestra página web.

This notice is authorized by the U.S. District Court, Eastern District of New York to inform you about a proposed settlement in *In re American Express Anti-Steering Rules Antitrust Litigation (II)*, No. 11-MD-2221 and *Marcus Corp. v American Express Co. et al.*, 13-CV-07355. These cases allege that certain rules applicable to merchants that accept American Express cards violate antitrust laws and result in merchants paying excessive fees. American Express denies the claims and says it has done nothing wrong. The Court has not decided which side is right because the parties agreed to settle.

American Express's records show that you are included in the settlement. The settlement applies to all merchants that accept American Express cards at any location in the United States (including at a physical merchant location, online or via a mobile application) as of or after December 23, 2013, onward.

The Settlement Terms. The settlement will require American Express to change its rules to allow merchants who accept American Express cards to charge customers an extra fee or "surcharge" if they pay with an American Express credit or charge card, under certain conditions including that any such surcharge apply to all credit and charge card transactions. **The specific rule changes and terms of the settlement are explained in detail on the case website (www.AmexMerchantSettlement.com) in the Court-approved, long-form notice ("Notice") and Class Settlement Agreement. You should review these documents carefully.** Your legal rights are affected even if you do nothing. You can also obtain copies of the Notice and Class Settlement Agreement by calling the toll-free number below.

If you want to seek monetary damages related to American Express's existing merchant rules, you can pursue those claims consistent with the dispute resolution provisions contained in your card acceptance agreement. No money will be distributed to the class.

Your Options. You may object to the settlement by **Month/Date, 2014**. The Notice available at the case website (www.AmexMerchantSettlement.com) explains how to object. The Court will hold a hearing on **Month/Date, 2014** to consider whether to approve the settlement and the request by the attorneys for the class for fees, expenses, and service awards up to a maximum total of $75 million. You do not need to appear at the hearing or hire your own attorney, although you have the right to do so at your own expense. Regardless of whether you object, if the settlement is finally approved, you will be bound by the Court's final judgment, and the releases explained in the Class Settlement Agreement.

Questions? Visit www.AmexMerchantSettlement.com or call **1-866-686-8694**

APPENDIX F — SETTLEMENT CLASS NOTICES

APPENDIX F2

PUBLICATION NOTICE

To all individuals and businesses that accept American Express cards: Notice of a class action settlement.

Si desea recibir esta notificación en español, llámenos o visite nuestra página web.

Notice of a class action settlement authorized by the U.S. District Court, Eastern District of New York.

This notice is authorized by the Court to inform you about an agreement to settle two class action lawsuits that may affect you. The cases - *In re American Express Anti-Steering Rules Antitrust Litigation (II)*, No. 11-MD-2221 and *Marcus Corp. v American Express Co. et al.*, 13-CV-07355 - are in the U.S. District for the Eastern District of New York. These cases allege that certain rules applicable to merchants that accept American Express cards violate antitrust laws and resulted in merchants paying excessive fees. The Court has not decided which side is right because the parties agreed to settle.

Who's included? The settlement applies to a class comprised of all merchants that accept American Express cards at any location in the United States (including at a physical merchant location, online or via a mobile application) as of or after December 23, 2013, onward.

What are the Settlement terms? The settlement will require American Express to change its rules to allow merchants who accept American Express cards to charge customers an extra fee or "surcharge" if they pay with an American Express credit or charge card under certain conditions including that any such surcharge apply to all credit and charge card transactions." to the end of the first sentence. **The specific rule changes and terms of the settlement are explained in detail on the case website (www.AmexMerchantSettlement.com) in the Court-approved, long-form notice ("Notice") and Class Settlement Agreement. You should review these documents carefully.** Your legal rights are affected even if you do nothing. You can also obtain copies of the Notice and Class Settlement Agreement by calling the toll-free number below.

You do not need to file a claim to receive the benefits of the rule changes provided for by the settlement. If you want to seek monetary damages related to American Express's existing merchant rules, you can pursue those claims consistent with the dispute resolution provisions contained in your card acceptance agreement. No money will be distributed to the class.

Your options. You may object to the settlement by **Month/Date, 2014**. The Notice available at the website (www.AmexMerchantSettlement.com) explains how to object. Regardless of whether you object, if the settlement is finally approved, you will be bound by the Court's final judgment and the releases explained in the Class Settlement Agreement, which is available at the website (www.AmexMerchantSettlement.com).

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Court hearing about the Settlement. The Court will hold a hearing on **Month/Date, 2014** to consider whether to approve the settlement and the request by the attorneys for the class for attorneys' fees, expenses, and service awards up to a maximum total of $75 million. You do not need to appear at the hearing or hire your own attorney. But you can if you want to, at your own cost. The Court has appointed Friedman Law Group, LLP, Reinhardt, Wendorf & Blanchfield, and Patton Boggs LLP to represent the class.

Questions? For more information about the settlement you should visit the website (www.AmexMerchantSettlement.com), email info@AmexMerchantSettlement.com, or call 1-866-686-8694

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APPENDIX F — SETTLEMENT CLASS NOTICES

APPENDIX F3

LONG FORM/WEBSITE NOTICE

A4762

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

To all individuals and businesses that accept American Express cards:

Notice of a class action settlement.

A federal court directed this Notice. This is not a solicitation from a lawyer.

- The Court has preliminarily approved a proposed settlement over allegations that certain rules applicable to individuals and businesses ("merchants") that accept American Express Cards in payment for goods or services violate the antitrust laws resulting in merchants paying excessive fees for accepting American Express cards.
- The settlement applies to a class comprised of all merchants that accept American Express cards at any location in the United States (including at a physical merchant location, online or mobile application), as of or after December 23, 2013, onward.
- The settlement will require American Express to change its merchant rules to allow merchants who accept American Express cards (i) to charge customers an extra fee or "surcharge" if they pay with an American Express credit or charge card, under certain conditions including that any such surcharge apply to all credit and charge card transactions and (ii) to decline acceptance of American Express traditional debit cards, if American Express decides in the future to issue a traditional debit card in the United States.
- If the settlement is approved and American Express changes it rules, any surcharge on American Express credit or charge cards must not be any higher, after accounting for any discounts offered at the point of sale, than any surcharge imposed on transactions made with other credit cards, payment cards, payment methods, products or services accepted by the merchant except for debit cards, cash, checks, wire or ACH transfers or proprietary store cards.
- The rule changes are explained in greater detail below and in the Class Settlement Agreement. A full copy of the Class Settlement Agreement is available on the case website at www.AmexMerchantSettlement.com or by calling 1-866-686-8694.
- Class members do not need to file a claim to receive the benefits of the settlement.
- No money will be distributed to the class. Any class member that wants to seek monetary damages related to American Express's existing merchant rules can pursue those claims consistent with the dispute resolution provisions contained in the merchant's card acceptance agreements and provisions have been made for access to the extensive evidentiary and litigation record that has been created by the attorneys for the class.
- This Notice explains the settlement and the class members' rights and options—**and the deadlines to exercise them**.
- If you are a member of the class your legal rights are affected whether you act or not. Read this Notice carefully.

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LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
OBJECT	Write to the Court about why you do not like any part of the settlement. To find out how to object, please read Question 9, below.
GO TO A HEARING	Ask to speak in Court about the fairness of the settlement.
DO NOTHING	You are not required to take any action to receive the benefits of the settlement.

- The Court in charge of this case still has to decide whether to approve the settlement.
- Regardless of whether you object, go to a hearing or do nothing, if the settlement is finally approved, you will be bound by the Court's final judgment and the releases explained in the Class Settlement Agreement.
- For the full terms of the settlement, you should review the Class Settlement Agreement, which is available on the case website at www.AmexMerchantSettlement.com or by calling 1-866-686-8694. In the event of any conflict between the terms of this Notice and the Class Settlement Agreement, the terms of the Class Settlement Agreement shall control.
- Please check www.AmexMerchantSettlement.com for updates relating to the settlement or the settlement approval process.

A4764

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION

1. Why is this Notice being provided?

You have a right to know about the proposed settlement of this class action lawsuit and about your options relating to the settlement. This Notice explains the litigation, the settlement, your legal rights and what benefits are available.

Judge Nicholas Garaufis of the United States District Court for the Eastern District of New York is overseeing the settlement of the case known as *In re American Express Anti-Steering Rules Antitrust Litigation (II)*, No. 11-MD-2221 (NGG) (RER), along with the case known as *The Marcus Corporation v American Express Co. et al.*, 13-cv-07355 (NGG)(RER), which was transferred to Judge Garaufis in connection with the settlement approval process. For a complete procedural history of the cases included in the settlement, please read the Class Settlement Agreement posted on the case website.

The Court has preliminary approved the settlement; certified an "injunctive" class under Fed. R. Civ. P. 23(b)(2); approved a plan for notifying Class members of the settlement and the opportunity to file objections; and created a mechanism for granting final approval of all terms of the Class Settlement Agreement. As part of the final approval process for the settlement, the Court will also be asked to award attorneys' fees and expenses covering the litigation and related activities of counsel and service awards to the merchants that brought the litigation.

This case has been brought on behalf of merchants. The specific merchants that filed the cases are the "Class Plaintiffs" and the Court has authorized them to act on behalf of all merchants in the class in connection with the proposed settlement of the litigation. The Class Plaintiffs are: The Marcus Corporation; Animal Land, Inc., Firefly Air Solutions, LLC, Il Forno, Inc., Italian Colors Restaurant, Jasa Inc., Lopez-Dejonge, Inc., and Plymouth Oil Corp.

The Class Plaintiffs sued American Express Company and American Express Travel Related Services, Inc., which are referred to together in this Notice as "American Express" or "Defendants."

2. What is this lawsuit about?

The lawsuit is about American Express's rules for merchants that accept American Express cards as payment for goods and/or services and the fees paid by merchants for accepting American Express cards. Class Plaintiffs claim that American Express violated the antitrust laws by imposing rules that limited merchants from steering their customers to other payment methods and requiring merchants that want to accept any American Express cards to accept all American Express cards. The Class Plaintiffs claim that doing so insulated American Express from competitive pressure to lower merchant fees and caused an upward spiral in merchant fees for American Express, Visa and MasterCard.

American Express denies Class Plaintiffs' claims and says it has done nothing wrong. American Express says that the challenged conduct was lawful, justified, and benefited competition, merchants, and consumers.

3. Why is this a class action?

In a class action, one or more individuals or businesses sue on behalf of people or businesses with similar claims. Together all of these people or businesses with similar claims and interests form a class, and are class members.

When a court decides a case or approves a settlement in a class action, that decision is applicable to all members of the class. In this case, the Court has created a class and given its preliminary approval to the settlement. The class that the court created is comprised of all merchants that accept American Express cards at any location in the United States (including at a physical merchant location, online or mobile application), as of or after December 23, 2013, onward.

The class is a mandatory class meaning that all members of the class will be bound by the settlement and that no class member can opt out of the class.

4. What is "injunctive relief"?

The settlement benefits for class members fall under the category of "injunctive relief." An injunction is when a court orders a person or a business to do or not to do something. In this case, American Express has agreed to certain changes to its merchant rules related to card acceptance. The changes to American Express's merchant rules are the benefit the class is receiving in this settlement. The settlement does not offer payments to class members or adjust any merchant's fees for accepting American Express cards. If a merchant wants to seek monetary damages related to American Express's merchant rules as they exist prior to the changes brought about by this settlement, the merchant remains free to pursue that claim consistent with the dispute resolution provisions of the merchant's card acceptance agreement.

5. Why is there a settlement?

The Court did not decide which side was wrong or if any laws were violated. Instead, both sides agreed to settle the litigation to avoid the cost and risk of trial and of appeals that would follow a trial.

The parties agreed to settle this case after close to eleven years of extensive litigation, including a decision by the United States Supreme Court upholding a provision in American Express's merchant card acceptance agreements requiring merchants to pursue claims against American Express on an individual basis in arbitration. The settlement is the product of extensive negotiations, including mediation with an experienced mediator. Class Plaintiffs and their counsel believe that settling this case is in the best interests of all class members because it allows class members to receive the benefit of the rules changes.

The settlement does not mean that any law was broken or that American Express did anything wrong.

WHO IS IN THE SETTLEMENT

To see if you will be affected by the settlement, you first have to determine if you are a class member.

6. How do I know if I am part of the settlement?

If you received a Postcard Notice in the mail, American Express' records show that you may be a class member.

The class includes all merchants that accept American Express cards in payment for goods or services at any location in the United States (including at a physical merchant location, online or mobile application) as of or after December 23, 2013, and onward. The class shall not include the named Defendants, their directors, officers, or members of their families.

7. What if I am still not sure whether I am included?

If you are still not sure whether you are included, or have any other questions about the settlement, call 1-866-686-8694 or visit the case website www.AmexMerchantSettlement.com. You also may write with questions to Amex Merchant Settlement Administrator, PO Box 4349, Portland, OR 97208-4349 or send an e-mail to questions@AmexMerchantSettlement.com.

SETTLEMENT BENEFITS

8. What are the benefits of the settlement?

American Express will amend its rules for merchants that accept American Express cards at any location in the United States (including at a physical merchant location, online or mobile application) to provide for the following:

a) Merchants will be able to charge a surcharge to customers who pay with an American Express credit or charge card, provided that:

(i) any surcharge on American Express credit or charge cards must not be any higher, after accounting for any discounts offered at the point of sale, than any surcharge imposed on transactions made with other credit cards, payment cards, payment methods, products or services accepted by the merchant except for: (a) debit cards; (b) cash; (c) checks; (d) wire or ACH transfers; or (e) proprietary store cards.

(ii) the amount of the surcharge does not exceed the American Express merchant discount rate applicable to that transaction and the amount of the surcharge the merchant is permitted to impose on any other credit card brand;

(iii) the surcharge is fully disclosed to customers on the same terms that the merchant is required to disclose Visa and MasterCard surcharges; and

(iv) the merchant provides 30 days notice to American Express that it intends to surcharge.

b) American Express debit cards, including pre-paid or gift cards, may not be surcharged unless or until similar cards on competitors' brands are subject to surcharging.

c) If American Express offers a traditional debit card in the United States, American Express may not make that card subject to its Honor All Cards policy. All existing cards

remain subject to the Honor All Cards policy, which require merchants to accept all American Express-branded cards.

d) *Exception*: A merchant may individually negotiate an agreement with American Express to waive or limit its rights to surcharge American Express cards if that agreement satisfies certain terms set forth in the Class Settlement Agreement.

e) Under the settlement, American Express will amend its rules no later than forty-five (45) days after the approval of the settlement becomes final. If the Court's approval of the settlement is appealed, the settlement will not become final until forty-five (45) days after that appeal is resolved.

For the full terms of the settlement, including the benefits to the class, you should review the Class Settlement Agreement, which is available on the case website at www.AmexMerchantSettlement.com or by calling 1-866-686-8694. In the event of any conflict between the terms of this Notice and the Class Settlement Agreement, the terms of the Class Settlement Agreement shall control.

OBJECTING TO THE SETTLEMENT

9. How do I tell the Court if I do not like the settlement?

You can tell the Court that you object to (disagree with) the terms of the Class Settlement Agreement. You can give reasons why the Court should not approve the settlement. You can also give reasons why the Court should not approve the petition for attorneys' fees and expenses or the service awards to the Class Plaintiffs that is detailed below in Question 13. The Court will consider your views.

To object, you must file your Statement of Objection. It must include the following:

a) The words "American Express Class Action Settlement";

b) State each and every objection you are making to the Settlement;

c) The specific reasons for each objection;

d) Legal support and evidence, if any, for each objection that you want to bring to the Court's attention;

e) Your name, address and phone number;

f) Information sufficient to establish that you are a member of the Settlement Class, such as your business name and address, and how long you have accepted American Express Cards; and

g) The full name, mail address, email address, and phone number of any counsel representing you in connection with the objections.

Your Statement of Objection must be filed by no later than April 11, 2014 (the "Class Objection Period") at the following address:

Clerk of the Court

United Sates Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

You must also send a copy of your Statement of Objection to the following addresses postmarked by no later than April 11, 2014:

CLASS COUNSEL	DEFENDANTS' COUNSEL
Mark Reinhardt Reinhardt, Wendorf & Blanchfield E-1250 First National Bank Bldg. 332 Minnesota St. St. Paul, MN 55101	John F. LaSalle Boies, Schiller & Flexner LLP 575 Lexington Avenue, 7th Floor New York, New York 10022

Do not call the Court or any Judge's office to object to the Settlement. If you have questions, please visit www.AmexMerchantSettlement.com or call 1-866-686-8694.

10. How does the proposed settlement affect my rights?

If the settlement becomes final, all class members will benefit from the changes to the American Express Rules. In addition, if the settlement becomes final, all class members will be releasing Defendants (American Express Company and American Express Travel Related Services Company, Inc.) and other released parties from all claims that are identified and described in paragraphs 24-41 of the Class Settlement Agreement. The Class Settlement Agreement may be viewed on the case website at www.AmexMerchantSettlement.com or you can receive a copy by mail by calling 1-866-686-8694.

The Class Settlement Agreement describes the released claims in necessary, accurate, legal terminology, so read it carefully. In the event of any conflict between the terms of this Notice and the Class Settlement Agreement, the terms of the Class Settlement Agreement shall control. You can talk to the law firms representing the class listed in Question 12 for free; or you can, at your own expense, talk to your own lawyer if you have questions about the released claims or what they mean.

11. Can I get out of the settlement?

No. The settlement requires American Express to make changes to its rules for merchants that accept American Express cards at any location in the United States (including at a physical merchant location, online or via mobile application), in ways that benefit all class members equally. As explained above, this type of remedy is "injunctive." Therefore, under this type of class action, you cannot exclude yourself from the class or this settlement. However, as explained above, you can still object to the settlement. If the settlement is finally approved, it will be applicable to all merchants regardless of whether or not they object.

THE LAWYERS REPRESENTING YOU

12. Do I have a lawyer in this case?

Yes. The law firms identified below represent you and other class members:

Gary B. Friedman Tracey Kitzman Friedman Law Group LLP 270 Lafayette Street New York, NY 10012	Read K. McCaffrey Patton Boggs LLP 2550 M Street, NW Washington, DC 20037	Mark Reinhardt Mark A. Wendorf Reinhardt Wendorf & Blanchfield 1250 East First National Bank Bldg 332 Minnesota Street St. Paul, MN 55101

These lawyers are called "Class Counsel." You will not be charged for these lawyers or for other counsel involved in the settlement. Any attorneys' fees, reimbursement of expenses and service awards to the Class Plaintiffs that are awarded by the Court will be paid directly by American Express. If you want to be represented by your own lawyer, you may hire one at your own expense. If you want to be represented by your own counsel in connection with an objection to this settlement, you must tell the Court of your request and send a copy of your request to Class Counsel.

13. How will the lawyers be paid?

Class Counsel will ask the Court for attorneys' fees and expense reimbursement for all counsel involved in the litigation, as well as service awards for the Class Plaintiffs. American Express agrees it will pay for any such attorneys' fees, expenses, and service awards ordered by the Court up to a maximum of $75 million.

American Express will also pay up to $2 million in costs associated with providing notice of the settlement to the class. It will also set up a $2 million fund to be used by Class Counsel to educate merchants about the changes to American Express's rules due to the settlement.

The amounts to be awarded as attorneys' fees, reimbursement of expenses, and service awards are all subject to approval by the Court. Class Counsel will submit motions and petitions to the Court for that purpose no later than March 7, 2014. Those motions and petitions and all supporting papers will be available at www.AmexMerchantSettlement.com shortly after they are filed.

THE COURT'S FAIRNESS HEARING

14. When and where will the Court decide whether to approve the settlement?

The Court will hold a Fairness Hearing at **_:__ _.m.** on **Month Day, 2014**, United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201. At this hearing, the Court will hear arguments and consider whether the settlement should be approved as fair, adequate and reasonable. The Court will also hear arguments and consider whether to approve Class Counsel's requests for attorneys' fees and expenses, and service awards. If there are objections, the Court will hear and consider them. The Court will also listen to any class members who have asked to be heard at the hearing. We do not know how long the Court will take to decide these matters.

The Fairness Hearing may be moved to a different date, time, or location without additional notice, so it is recommended that you periodically check the case website for updated information.

15. Do I have to come to the Fairness Hearing?

No. Class Counsel will answer the questions the Court may have concerning the settlement. But, you are welcome to come at your own expense. If you send an objection, you do not have to come to court to talk about it. As long as you mailed your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

16. May I speak at the Fairness Hearing?

You may ask the Court for permission to speak at the Fairness Hearing. To do so, you must send a letter that it is your "notice of intention to appear in American Express Class Action Settlement." Your notice of intention to appear must include your name, address and phone number, and the name, position, address and phone number of each person who intends to appear at the final approval hearing on your behalf. Your notice of intention to appear must be filed with the Clerk of Court and mailed, postmarked no later than April 11, 2014 (the "Class Objection Period"). You must also send a copy of your notice of intention to appear to the addresses for Class Counsel and Defendants' Counsel listed in Question 9 above.

IF YOU DO NOTHING

17. What happens if I do nothing?

You are not required to take any action to receive the benefits of the settlement. If the settlement is finally approved, you will be bound by the Court's Final Judgment and the release explained in the Class Settlement Agreement.

GETTING MORE INFORMATION

18. How do I get more information?

This Notice summarizes the proposed settlement and the benefits available. More details are in the Class Settlement Agreement, which is available on the case website at www.AmexMerchantSettlement.com. The website also contains the filings related to approval of the settlement and other case-related documents.

You also may call the toll-free number below or write with questions to Amex Merchant Settlement Administrator, PO Box 4349, Portland, OR 97208-4349 or send an e-mail to info@AmexMerchantSettlement.com.

Do not call the Court or any Judge's office to get more information about the settlement.

APPENDIX G — Class Settlement Order and Final Judgment

[Caption for either Animal Land Consolidated Action or the Marcus Action]

CLASS SETTLEMENT ORDER AND FINAL JUDGMENT

On _____ __, 2014, the Court held a final approval hearing on (1) whether the terms and conditions of the Definitive Class Settlement Agreement, including all its Appendices, entered into as of December 19, 2013 (the "Class Settlement Agreement") are fair, reasonable, and adequate for the settlement of the claims released against the Defendants in the Class Actions by Class Plaintiffs and the Settlement Class provisionally certified by the Court pursuant to the Class Settlement Agreement; and (2) whether judgment should be entered dismissing all causes of action against the Defendants seeking injunctive relief in those Class Actions with prejudice and all causes of action against the Defendants seeking damages in those Class Actions without prejudice.

The Court, having considered all papers filed concerning the Class Settlement Agreement, and all matters submitted to the Court at the final approval hearing and otherwise, hereby FINDS, with all terms used herein having the same meanings set forth and defined in the Class Settlement Agreement, that:

A. This Court has jurisdiction over the Class Plaintiffs, the Settlement Class, and the Defendants, and jurisdiction to finally approve the Class Settlement Agreement.

B. The notice procedures provided to the Settlement Class, including but not limited to the methods of identifying and notifying members of the Settlement Class, were fair, adequate, and sufficient, constituted the best practicable notice under the circumstances, and were reasonably calculated to apprise members of the Settlement Class that would be bound by the Class Settlement Agreement of the Action, the Class Settlement Agreement, and their

objection rights, and fully satisfied the requirements of Federal Rule of Civil Procedure 23, any other applicable laws or rules of the Court, and due process.

C. The notice requirements of the Class Action Fairness Act, 28 U.S.C. § 1715, have been met.

D. The Court has held a final approval hearing to consider the fairness, reasonableness, and adequacy of the Class Settlement Agreement, and has been advised of all objections to the Class Settlement Agreement and has given due consideration thereto.

E. The Class Settlement Agreement, including its consideration and release provisions:

(1) was entered into in good faith, following arm's-length negotiations, and was not collusive;

(2) is fair, reasonable, and adequate, and is in the best interests of the Settlement Class;

(3) is consistent with the requirements of federal law and all applicable court rules, including Federal Rule of Civil Procedure 23; and

(4) was entered into at a time when the record was sufficiently developed and complete to enable the Class Plaintiffs and the Defendants to have adequately evaluated and considered all terms of the Class Settlement Agreement.

ACCORDINGLY, pursuant to Federal Rule of Civil Procedure 23(e), the Class Settlement Agreement, the terms and conditions of which are hereby incorporated by reference, are hereby fully and finally APPROVED by the Court.

NOW, THEREFORE, based on good cause appearing therefor, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Based on and pursuant to the class action criteria of Federal Rules of Civil Procedure 23(a) and 23(b)(2), the Court hereby finally certifies, for settlement purposes only, a Settlement Class, from which exclusion were not and shall not be permitted, consisting of all Persons that as of the Settlement Preliminary Approval Date or in the future accept any American Express-Branded Cards at any location in the United States (including at a physical merchant location, online and mobile application), except that the Settlement Class shall not include the named Defendants, their directors, officers, or members of their families.

2. The Settlement Class shall include all Persons, described in Paragraph 1 above, regardless of whether such Persons have restricted, in any way, the means by which they can resolve disputes against the Defendants or the procedural mechanisms available for the resolution of disputes against the Defendants. Such restrictions include, without limitation, restrictions regarding or requiring arbitration, jury trials, participation in dispute resolution in a representative capacity, participation in dispute resolution as a member of a class or on a consolidated basis, or any other rights that may be available in court that are not available in arbitration.

3. In the event of termination of the Class Settlement Agreement as provided therein, certification of the Settlement Class shall automatically be vacated and each Defendant may fully contest certification of any class as if no Settlement Class had been certified.

4. The Class Plaintiffs shall continue to serve as representatives of the Settlement Class. The law firms of Friedman Law Group LLP, Patton Boggs LLP, and Reinhardt, Wendorf & Blanchfield shall continue to serve as Class Counsel.

5. The definition of the proposed injunctive relief classes in the Operative Class Action Complaints are hereby amended to be the same as the Settlement Class finally certified above.

6. Subject to Paragraphs 7–23 and the other terms of the Class Settlement Agreement, as consideration for the release of their claims, members of the Settlement Class will receive benefits from modifications of the American Express Merchant Regulations and/or American Express card acceptance agreements applicable to United States Merchant Locations, including the following.

a. The American Express NDPs shall remain unchanged and shall continue to prohibit discrimination against the use of American Express-Branded Cards, except as expressly set forth in the Class Settlement Agreement.

b. Any surcharge, whether expressed as a percentage or flat fee, that a merchant imposes on American Express-Branded Credit Card transactions must not be any higher than any surcharge imposed on transactions effected with any other Credit Card, payment card, payment method, products, or services accepted by the merchant, after accounting for any discounts or rebates offered at the point of sale, except for (i) Debit Cards; (ii) cash; (iii) checks; (iv) transfer of funds to merchants via bank wire transfer or via the Automated Clearing House of the Federal Reserve System; and (v) Proprietary Store Cards. The phrase "after accounting for any discounts or rebates at the point of sale" shall mean that to the extent the merchant offers a rebate or discount at the point of sale for the use of any other Credit Card, payment card, payment service or payment method (except for Debit Cards, cash, checks, funds transfers as described above or Proprietary Store Cards), any surcharge, whether expressed as a percentage or flat fee, that the merchant imposes on American Express-Branded Credit Card transactions must not be higher than the net amount of (x) the surcharge imposed on transactions effected using such other Credit Card, payment card, payment service or payment method, offset by (y) such rebate or discount.

c. In addition, no surcharge imposed on an American Express-Branded Credit Card, whether expressed as a percentage or flat fee, may be higher than the lowest of (i) the amount of the American Express Merchant Discount Rate charged to that merchant for American Express acceptance for the specific transaction; and (ii) any surcharge that the merchant is permitted to impose (which may be zero) on transactions effected with any other Credit Card, regardless of whether the merchant actually surcharges transactions effected on such other Credit Card in excess of the permitted amount..

d. The American Express NDPs shall continue to prohibit any discrimination against American Express-Branded Debit Card transactions (including without limitation

American Express-Branded Traditional Debit Card transactions) as compared to any Other Payment Network's Debit Card transactions.

e. Consistent with this Class Settlement Agreement, a merchant may impose a surcharge on Credit Card transactions, including without limitation American Express-Branded Credit Card transactions, without imposing any surcharge upon any transactions made directly with a Debit Card.

f. The American Express HAC Provisions remain unchanged and continue to require that merchants agreeing to accept American Express-Branded Cards must accept all American Express-Branded Cards, except that in the event that there is an American Express-Branded Traditional Debit Card, merchants can choose not to accept such American Express-Branded Traditional Debit Cards.

g. For the sake of clarity, the foregoing change to the American Express HAC Provisions would only permit a merchant that accepts American Express-Branded Cards to choose not to accept an American Express-Branded Traditional Debit Card.

h. The parties understand that (a) there currently are no American Express-Branded Traditional Debit Cards; and (b) American Express's HAC provisions will continue to require merchants that accept any American Express-Branded Cards to accept all currently existing American Express-Branded Cards.

i. Nothing in the Class Settlement Agreement or this Class Settlement Order and Final Judgment shall prevent Defendants from having a provision in the American Express Merchant Regulations or American Express card acceptance agreements that prevents merchants that charge a convenience fee from also charging a surcharge.

j. The foregoing amendments described above shall remain in effect until the Release Termination Date.

7. The Court orders Defendants to modify the American Express NDPs and American Express HAC Provisions in conformity with the Class Settlement Agreeement.

8. Each member of the Settlement Class and each Settlement Class Releasing Party unconditionally, fully, and finally releases and forever discharges the Defendants and each of the other Settlement Class Released Parties from all released claims, and waives any rights to the protections afforded under California Civil Code Section 1542, South Dakota Codified Laws Section 20-7-11 and/or any other similar, comparable, or equivalent laws.

9. Specifically, the members of the Settlement Class provide the following release and covenant not to sue:

a. The "Settlement Class Releasing Parties" are the Class Plaintiffs, each and every member of the Settlement Class, and any of their respective past, present or future: officers and directors; stockholders, agents, employees, legal representatives, partners and associates (in their capacities as stockholders, agents, employees, legal representatives, partners, and associates of a member of the Settlement Class only); and trustees, parents, subsidiaries, divisions, affiliates, heirs, executors, administrators, purchasers, predecessors, successors, and assigns—whether or not they object to this Class Settlement Agreement, and whether or not they exercise any benefit provided under the Class Settlement Agreement, whether directly, representatively, derivatively, or in any other capacity.

b. The "Settlement Class Released Parties" are all of the following:

i. American Express Company and American Express Travel Related Services Company, Inc.

ii. For each of the entities in Paragraph (i) above, each of their respective past, present, and future, direct and indirect, parents (including holding companies), subsidiaries, affiliates, and associates (all as defined in SEC Rule 12b-2 promulgated pursuant to the Securities Exchange Act of 1934, as amended), or any other entities in which more than 50% of the equity interests are held, and any unaffiliated entities that are licensed to issue American Express-Branded Cards or are authorized or required to enforce the American Express HAC Provisions or the American Express NDPs.

iii. For each of the entities in Paragraphs (9)(b)(i)-(ii) above, each of their respective past, present, and future principals, trustees, partners, officers, directors, employees, agents, attorneys, legal or other representatives, trustees, heirs, executors, administrators, shareholders, advisors, predecessors, successors, purchasers, and assigns (including acquirers of all or substantially all of the assets, stock, or other ownership interests of each of the foregoing entities to the extent a successor's, purchaser's, or acquirer's liability is based on the actions of the Settlement Class Released Parties as defined in Paragraphs (9)(b)(i)-(ii) above).

c. In addition to the effect of the Class Settlement Order and Final Judgment entered in accordance with this Class Settlement Agreement, including but not limited to any *res judicata* effect, the Settlement Class Releasing Parties (i) hereby expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the Settlement Class Released Parties from any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, or otherwise in nature, for any form of declaratory, injunctive, or equitable relief and (ii) hereby expressly and irrevocably waive any and all defenses relating to any form of declaratory, injunctive, or equitable relief, in each case relating to the period from the beginning of time to and including the Release Termination Date, regardless of when such claims or defenses accrue, whether known or unknown, suspected or unsuspected, in law or in equity that any Settlement Class Releasing Party now has, or hereafter can, shall, or may in the

future have, arising out of or relating in any way to any conduct, acts, transactions, events, occurrences, statements, omissions, or failures to act of any Settlement Class Released Party that fall within the identical factual predicate doctrine as applied to the Marcus Action and the Animal Land Consolidated Action, including but not limited to any claims based on or relating to:

i. Any actual or alleged rules or provisions that limit merchants, in any way, from engaging in any of the following (except as explicitly provided by applicable law): indicating or implying a preference, directly or indirectly for any payment product or method of payment; dissuading customers from using American Express-Branded Cards; criticizing or mischaracterizing American Express-Branded Cards or any services or programs of American Express; persuading or prompting customers to use other payment products or methods of payment; imposing any restriction, conditions, or disadvantages on American Express-Branded Cards that are not imposed equally on all other payment products; engaging in activities that harm American Express's business or brand; promoting any payment products or methods of payment more actively than American Express-Branded Cards; communicating with customers about the cost of acceptance of payment cards, payment products, or methods of payments; displaying signs or decals of other payment products, payment cards, or methods of payment more prominently than signs or decals for American Express-Branded Cards; and any other conduct inconsistent with the American Express NDPs;

ii. Any actual or alleged "no surcharge" rules or provisions, "no discounting" rules or provisions, "non-discrimination" rules or provisions, "anti-steering" rules or provisions, rules or provisions that limit merchants in favoring or steering customers to use certain payment forms, or any point of sale practices relating to any American Express-Branded Cards;

iii. In any proceeding related to the American Express NDPs or American Express HAC Provisions, any claims or defenses that have been raised or could have been raised in these Actions concerning the enforceability or legality of any rules or provisions (as they currently exist or as they exist in the future in substantially similar form) that limit merchants, in any way, from consolidating or aggregating any claim with another claim asserted by any other Person; acting as a representative plaintiff in any class action; or participating in any class action as a non-representative member of the class.

iv. Any actual or alleged rules or provisions that require merchants to accept all American Express-Branded Cards, including but not limited to charge cards, credit cards, corporate cards, debit cards, prepaid cards, reloadable prepaid cards, Bluebird® cards, Serve® cards, and gift cards, as a condition of accepting any American Express-Branded Card;

v. Any actual or alleged rules or provisions that tie acceptance by merchants of any type of American Express-Branded Card to any other type of American Express-Branded Card;

vi. The future effect in the United States of the continued imposition of or adherence to any rule or provision identified above, any rule or provision as modified by this Class Settlement Agreement, and any rule or provision that is substantially similar; and

vii. Any conduct in these Actions, including the negotiation and execution of this Class Settlement Agreement.

And it is expressly agreed, for purposes of clarity, without expanding or limiting the foregoing, that any claims based on or relating to (i)-(vii) above are claims that fall within the identical factual predicate doctrine as applied to the Marcus Action and the Animal Land Consolidated Action.

d. In addition to the effect of the Class Settlement Order and Final Judgment entered in accordance with this Class Settlement Agreement, including but not limited to any *res judicata* effect, the Settlement Class Releasing Parties hereby expressly and irrevocably waive, and fully, finally, and forever settle, discharge, and release the Settlement Class Released Parties from any and all manner of claims, demands, actions, suits, and causes of action, whether individual, class, representative, or otherwise in nature, for any damages or other monetary relief relating to the period after the Provisions Change Date and continuing to and including the Release Termination Date, regardless of when such claims accrue, whether known or unknown, suspected or unsuspected, in law or in equity that any Settlement Class Releasing Party now has, or hereafter can, shall, or may in the future have, arising out of or relating in any way to any conduct, acts, transactions, events, occurrences, statements, omissions, or failures to act of any Settlement Class Released Party, provided such claims fall within the identical factual predicate doctrine as applied to the Marcus Action and the Animal Land Consolidated Action and provided further that such claims are based on the American Express NDPs or the American Express HAC Provisions (including as amended in connection with this Class Settlement Agreement), including but not limited to any claims based on the following:

i. Any actual or alleged rules or provisions that limit merchants, in any way, from engaging in any of the following (except as explicitly provided by applicable law): indicating or implying a preference, directly or indirectly for any payment product or method of payment; dissuading customers from using American Express-Branded Cards; criticizing or mischaracterizing American Express-Branded Cards or any services or programs of American Express; persuading or prompting customers to use other payment products or methods of payment; imposing any restriction, conditions, or disadvantages on American Express-Branded Cards that are not imposed equally on all other payment products; engaging in activities that harm American Express's business or brand; promoting any payment products or methods of payment more actively than American Express-Branded Cards; communicating with customers about the cost of acceptance of payment cards, payment products, or methods of payments; displaying signs or decals of other payment products, payment cards, or methods of payment more prominently than signs or decals for American Express-Branded Cards; and any other conduct inconsistent with the American Express NDPs;

ii. Any actual or alleged "no surcharge" rules or provisions, "no discounting" rules or provisions, "non-discrimination" rules or provisions, "anti-steering" rules or provisions, rules or provisions that limit merchants in favoring or steering customers to use certain payment forms, or any point of sale practices relating to any American Express-Branded Cards;

iii. Any actual or alleged rules or provisions that require merchants to accept all American Express-Branded Cards, including but not limited to charge cards, credit cards, corporate cards, debit cards, prepaid cards, reloadable prepaid cards, Bluebird® cards, Serve® cards, and gift cards, as a condition of accepting any American Express-Branded Card;

iv. Any actual or alleged rules or provisions that tie acceptance by merchants of any type of American Express-Branded Card to any other type of American Express-Branded Card;

v. The future effect in the United States of the continued imposition of or adherence to any rule or provision identified above, any rule or provision as modified by this Class Settlement Agreement, and any rule or provision that is substantially similar; and

And it is expressly agreed, for purposes of clarity, without expanding or limiting the foregoing, that any claims based on or relating to (i)-(v) above are claims that are based on the American Express NDPs or the American Express HAC Provisions.

e. Each Settlement Class Releasing Party further expressly and irrevocably waives, and fully, finally, and forever settles and releases, any and all defenses, rights, and benefits that the Settlement Class Releasing Party may have or that may be derived from the provisions of applicable law which, absent such waiver, may limit the extent or effect of the release contained in the preceding Paragraphs (9)(a)-(d). Without limiting the generality of the foregoing, each Settlement Class Releasing Party expressly and irrevocably waives and releases any and all defenses, rights, and benefits that the Settlement Class Releasing Party might otherwise have in relation to the release by virtue of the provisions of California Civil Code Section 1542, South Dakota Codified Laws Section 20-7-11, or similar laws of any other state or jurisdiction. CALIFORNIA CIVIL CODE SECTION 1542 PROVIDES: "CERTAIN CLAIMS NOT AFFECTED BY GENERAL RELEASE. A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR." SECTION 20-7-11 PROVIDES: "UNKNOWN CLAIMS NOT RELEASED BY GENERAL RELEASE. A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR." In addition, although each Settlement Class Releasing Party may hereafter discover facts other than, different from, or in addition to those that it or he or she knows or believes to be true with respect to any claims released in the preceding Paragraphs (9)(a)-(d), each Settlement Class Releasing Party hereby expressly waives, and fully, finally, and forever settles, discharges, and releases, any known or unknown, suspected or unsuspected, contingent or non-contingent claims within the scope of the preceding Paragraphs (9)(a)-(d), whether or not concealed or hidden, and without regard to the subsequent discovery or existence of such other, different, or additional facts. Class Plaintiffs acknowledge, and the members of the Settlement Class shall be deemed by operation of the Class Settlement Order and Final Judgment to have acknowledged, that the foregoing waiver was separately bargained for and is a key element of this Class Settlement Agreement.

f. Each Settlement Class Releasing Party covenants and agrees that it shall not, hereafter, seek to establish, or permit another to act for it in a representative capacity to seek to establish, liability against any of the Settlement Class Released Parties based, in whole or in part, upon any conduct covered by any of the claims released in in Paragraphs (9)(a)-(e) above.

g. For purposes of clarity, it is specifically intended for the release and covenant not to sue provisions of Paragraphs (9)(a)-(f) above to preclude all members of the Settlement Class from seeking or obtaining any form of declaratory, injunctive, or equitable relief prior to the Release Termination Date (which date shall be a minimum of ten years following the Provisions Change Date) with respect to any rule or provision that was or could have been challenged in these Actions as it is alleged to exist, now exists, may be modified in the manner provided in Paragraph 8 of the Class Settlement Agreement, subject to Paragraph 10 of the Class Settlement Agreement, or may in the future exist in the same or substantially similar form thereto.

h. For purposes of clarity, it is specifically intended for the release and covenant not to sue provisions of Paragraphs (9)(a)-(f) above to preclude all members of the Settlement Class from seeking or obtaining any form of damages or other monetary relief allegedly arising during the period starting with the Provisions Change Date and ending with the Release Termination Date (which period shall be a minimum of ten years) with respect to any American Express NDPs or the American Express HAC Provisions (including as amended in connection with the Class Settlement Agreement) that was or could have been challenged in these Actions as it is alleged to exist, now exists, may be modified in the manner provided in Paragraph 8 of the Class Settlement Agreement, subject to Paragraph 10 of the Class Settlement Agreement, or may in the future exist in the same or substantially similar form thereto.

i. For purposes of clarity, it is specifically intended for the release and covenant not to sue provisions of Paragraphs (9)(a)-(f) above to preclude all members of the Settlement Class from challenging the American Express NDPs, the American Express HAC Provisions, or the changes to those provisions described in Paragraph 8 of the Class Settlement Agreement, subject to Paragraph 10 of the Class Settlement Agreement (by seeking an injunction, a declaratory judgment, or any other form of equitable relief), or seeking damages associated with the American Express NDPs or the changes to those provisions described in Paragraph 8 of the Class Settlement Agreement, subject to Paragraph 10 of the Class Settlement Agreement, for a period starting with the Provisions Change Date and ending with the Release Termination Date (which period shall be for a minimum of ten years).

j. It is intended for the release and covenant not to sue provisions of Paragraph (9)(a)-(f) to be as broad as legally permissible subject to the identical factual predicate doctrine as applied to the Animal Land Consolidated Action and the Marcus Action.

k. For avoidance of doubt, no provision in this Class Settlement Agreement releases any claim of a Settlement Class Releasing Party that is based on:

i. Breach of this Class Settlement Agreement;

ii. *Parens patriae*, law enforcement, or regulation actions by any government or quasi-governmental entity to enforce sovereign or quasi-sovereign interests;

iii. An action by a competitor except for claims by such competitor in its capacity as a merchant; or

iv. Standard commercial disputes arising in the ordinary course of business regarding individual chargeback disputes, products liability, breach of warranty, misappropriation of cardholder data or invasion of privacy, compliance with technical specifications for a merchant's acceptance of a Credit Card or Debit Card, and any other dispute arising out of a breach of any contract between any of the Settlement Class Releasing Parties and any of the Settlement Class Released Parties; provided, however, that Paragraphs (9)(a)-(j) above and not this Paragraph shall control in the event that any such claim challenges the legality of any American Express HAC Provisions, any American Express NDPs, discrimination rule, provision, or other conduct covered by any of the claims released in Paragraphs (9)(a)-(j) above.

l. The parties recognize that certain provisions or aspects of the American Express NDPs are currently being challenged by the Department of Justice in *United States v. American Express*, 10-cv-4496 (E.D.N.Y.) (NGG) (RER). In the event that such litigation concludes with a judgment, order or consent decree implementing a further revision of American Express's rules, nothing in this release shall be deemed to affect any right that a member of the settlement class may have to seek enforcement of any such judgment, order or consent decree, or to enjoy any benefits or rights to injunctive relief secured by such judgment, order or consent decree.

m. Each Settlement Class Releasing Party further releases each of the named Defendants and their counsel and experts in these Actions from any claims relating to the conduct in these Actions and defense of these Actions, including the negotiation and terms of this Class Settlement Agreement, except for any claims relating to enforcement of this Class Settlement Agreement. Each named Defendant releases the Class Plaintiffs, other plaintiffs in the Class Actions, Class Counsel, and their respective experts in the Class Actions, from any claims relating to their institution or prosecution of the Class Actions, including the negotiation and terms of this Class Settlement Agreement, except for any claims relating to enforcement of this Class Settlement Agreement.

n. In the event that the Class Settlement Agreement is terminated pursuant to Paragraphs 61–63 of the Class Settlement Agreement, or any condition for the Settlement Effective Date is not satisfied, the release and covenant not to sue provisions of Paragraphs (9)(a)-(m) above shall be null and void and unenforceable.

o. Except as expressly set forth in Paragraphs 26 and 27 of the Class Settlement agreement, nothing in this Release shall affect the right of any Settlement Class Member to pursue any action or arbitration for damages for any claim. Subject to the release and covenant not to sue, each of the putative class representatives in the Class Actions, including without limitation The Marcus Corporation, agrees that it can only pursue any damages claims through binding arbitration consistent with its card acceptance agreement with American Express (as amended or modified).

p. The release and covenant not to sue of the Settlement Class shall remain in effect until the Release Termination Date. No member of the Settlement Class can challenge the American Express NDPs or American Express HAC Provisions, or the amendments set forth in Paragraph 8 of the Class Settlement Agreement (by seeking an injunction, declaratory judgment, or any other form of equitable relief) or seek damages associated with the American Express NDPs or American Express HAC Provisions or the amendments set forth in Paragraph 8 of the Class Settlement Agreement relating to the period of time between the Provisions Change Date and the Release Termination Date.

10. All claims for injunctive relief sought in the Class Actions are dismissed with prejudice, with each party to bear its own costs, except as and to the extent provided for in the Class Settlement Agreement.

11. All claims for damages sought in the Class Actions, including without limitation the Marcus Action, are dismissed without prejudice, with each party to bear its own costs, except as and to the extent provided for in the Class Settlement Agreement.

12. All members of the Settlement Class, and those subject to their control, are hereby enjoined and forever barred from commencing, maintaining, or participating in, or permitting another to commence, maintain, or participate in on its behalf, any claims released against Settlement Class Released Parties.

13. Without affecting the finality of this judgment in any way, and as further provide in Paragraphs 64–67 of the Class Settlement Agreement, this Court hereby retains exclusive continuing jurisdiction in the Animal Land Consolidated Action and the Marcus Action over the Class Plaintiffs, the members of the Settlement Class, and the Defendants to implement, administer, consummate, and enforce this Class Settlement Agreement and the Class Settlement Order and Final Judgment, including any disputes relating to, or arising out of, the release and covenant not to sue of the Settlement Class or any claim that was or could have been alleged in these Actions.

14. The Defendants and the Class Plaintiffs agree, and the members of the Settlement Class will be deemed to have agreed, to submit irrevocably to the exclusive jurisdiction of the United States District Court for the Eastern District of New York for the resolution of any matter covered by this Class Settlement Agreement, the Class Settlement Order and Final Judgment, or the applicability of this Class Settlement Agreement or the Class Settlement Order and Final Judgment.

15. All applications to the Court with respect to any aspect of this Class Settlement Agreement or the Class Settlement Order and Final Judgment shall be presented to and be determined by United States District Court Judge Nicholas Garaufis for resolution as a matter within the Actions, or, if he is not available, any other District Court Judge designated by the Eastern District of New York. Without limiting the generality of the foregoing, it is hereby agreed that any suit, action, proceeding, or dispute of a Class Plaintiff or member of the Settlement Class, in which the provisions of this Class Settlement Agreement or the Class Settlement Order and Final Judgment are asserted as a ground for a defense, in whole or in part, to any claim or cause of action, or are otherwise raised as an objection, constitutes a suit, action, proceeding, or dispute arising out of or relating to this Class Settlement Agreement or the Class Settlement Order and Final Judgment.

16. In the event that the provisions of this Class Settlement Agreement or the Class Settlement Order and Final Judgment are asserted by any Defendant or Settlement Class Released Party as a ground for a defense, in whole or in part, to any claim or cause of action, or are otherwise raised as an objection in any other suit, action, or proceeding by a Class Plaintiff or member of the Settlement Class, it is hereby agreed that the Settlement Class Released Parties shall be entitled to an immediate stay of that suit, action, or proceeding until after the Court has

entered an order or judgment determining any issues relating to the defense or objections based on such provisions, and no further judicial review of such order or judgment is possible.

17. In any arbitration proceeding filed by a merchant against American Express asserting a claim solely for damages relating to the American Express NDPs or American Express HAC Provisions where such claim was or could have been asserted in either of these Actions, both American Express and any merchant which has filed such a claim shall be permitted to receive in discovery in connection with such arbitration any court-filed documents in these Actions or any discovery in these Actions (including depositions, documents, interrogatory answers, and expert reports) that Class Counsel actually received or had the right to receive during the pendency of these Actions. The parties agree that all discovery in the Marcus Action and all court-filed documents in the Marcus Action were reproduced or deemed reproduced to Class Counsel in the Animal Land Consolidated Action and are covered by the Animal Land Protective Order. Before any merchant shall be permitted to receive any such documents or discovery, such merchant and its counsel shall agree (a) to be bound by a confidentiality agreement that provides at least the same level of protections as the Animal Land Protective Order and the Marcus Protective Order and (b) to follow substantially the same protections afforded to each such document or discovery as such document or discovery received pursuant to the Animal Land Animal Land Protective Order or Marcus Protective Order when initially produced.

18. The terms and provisions of the Animal Land Protective Order and the Marcus Protective Order shall survive and continue in effect through and after any final adjudication of the Class Actions, except as modified by the Court.

19. Nothing in the Class Settlement Agreement or this Class Settlement Order and Final Judgment is or shall be deemed or construed to be an admission or evidence of any violation of any statute or law or of any liability or wrongdoing by any of the Defendants, or of the truth or validity or lack of truth or validity of any of the claims of allegations alleged in any of the Class Actions.

20. Nothing in this Class Settlement Order and Final Judgment is intended to or shall modify the terms of the Class Settlement Agreement.

21. Without limiting Paragraph 22 below, nothing in this Class Settlement Order and Final Judgment shall limit the ability of American Express to determine American Express Merchant Discount Rates or other pricing or fees applicable (either by rule or negotiated agreement) to individual merchants or groups of merchants.

22. The parties recognize and agree that this Class Settlement Agreement shall be governed by the good faith and fair dealing obligations applicable to contracts under New York law.

23. This Class Settlement Order and Final Judgment terminates and disposes of all claims against the Defendants in the Class Actions. There is no just reason for delay in entering final judgment. The Court hereby directs the Clerk to enter judgment forthwith in accordance with the terms of this Class Settlement Order and Final Judgment, which judgment shall be final and appealable.

IT IS SO ORDERED.

DATED: _____

_____
THE HONORABLE NICHOLAS GARAUFIS

EXHIBIT 1 TO SETTLEMENT CLASS ORDER AND FINAL JUDGMENT

All putative class actions consolidated in *In re American Express Anti-Steering Rules Antitrust Litigation (II)*, No. 11-MD-2221 (E.D.N.Y.) (NGG)(RER), including but not limited to

In re American Express Anti-Steering Rules Antitrust Litigation, No. 06-CV-02974 (NGG) (RER) (E.D.N.Y.), formerly No. 06-CV-02974 (WHP) (S.D.N.Y.)

Firefly Air Solutions, LLC v. American Express Company, et al., No. 10-cv-05200 (NGG) (RER) (E.D.N.Y.)

Plymouth Oil Corp. v. American Express Company, et al., No. 10-cv-05369 (NGG) (RER) (E.D.N.Y.)

Jasa, Inc. et al. v. American Express Company, et al., No. 11-cv-00732 (NGG) (RER) (E.D.N.Y.)

Nat'l Supermarkets Ass'n, Inc. v American Express Company, No. 11-cv-01448 (NGG) (RER) (E.D.N.Y.), formerly 10-CV-04551 (WHP) (S.D.N.Y.)

Treehouse, Inc. v. American Express Company, et al., No. 11-cv-00882 (NGG) (RER) (E.D.N.Y.), formerly No. 10-CV-00790 (SLC) (W.D. Wis.)

Il Forno, Inc. v. American Express Company, et al., No. 11-cv-00881 (NGG) (RER) (E.D.N.Y.), formerly No. 11-CV-00306 (AHM) (PJW) (C.D. Cal.)

All putative class actions consolidated in *In re American Express Anti-Steering Rules Antitrust Litigation*, No. 06-CV-02974 (E.D.N.Y.) (NGG)(RER), including but not limited to

Animal Land, Inc., et al. v. American Express Company, et al., No. 09-CV-2291 (S.D.N.Y.) (WHP)

Performance Labs, Inc. et al. v. American Express Company, et al., No. 06-CV-2974 (S.D.N.Y.) (WHP)

Lopez DeJonge, Inc. et al., v. American Express Company. et al., No. 07-CV-1303 (S.D.N.Y.) (WHP)

Nat'l Supermarkets Ass'n, Inc. v. American Express Company, et al., No. 06-CV-4551 (S.D.N.Y.) (WHP)

The Marcus Corp. v. American Express Co. et al., No. 04-CV-05432 (GBD) (S.D.N.Y.)

APPENDIX H — Counsel Names and Contact Information

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION

This Document Relates To:
CONSOLIDATED CLASS ACTION

11-MD-02221 (NGG) (RER)

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THE MARCUS CORPORATION,
on behalf of itself and all similarly situated persons,

13-CV-07355 (NGG) (RER)

Plaintiff,

- against -

AMERICAN EXPRESS COMPANY, et al.,

REDACTED - PUBLIC VERSION

Defendants.

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CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

April 15, 2014

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CASES

Plaintiffs The Marcus Corporation, Animal Land, Inc., Firefly Air Solutions, LLC, Il Forno, Inc., Italian Colors Restaurant, Jasa Inc., Lopez-Dejonge, Inc., and Plymouth Oil Corp. ("Class Plaintiffs") respectfully submit this memorandum of law in support of their motion seeking an Order from this Court granting final approval of the settlement of the consolidated class action proceedings in *In re American Express Anti-Steering Rules Antitrust Litig.*, 11-MD-2221 (NGG) (RER) (the "*Amex ASR*" case) and *Marcus Corp. v. American Express Co.*, 13-CV-07355 (NGG) (RER) ("*Marcus*").

I. Introduction

The instant settlement caps a forty-year effort by U.S. merchants to obtain the right to assess "surcharges" on credit card transactions – *i.e.*, to use transparent price signals at the point of sale to recoup the cost of credit card acceptance and incent consumers to use cheaper payment products, such as debit or cash.

The long road to this settlement began in the mid-1970s, as lobbyists for Master Charge, BankAmericard and American Express convinced Congress to enact legislation that banned merchant surcharges. Senator William Proxmire of Wisconsin, one of the surcharge ban's chief opponents and a noted consumer advocate, explained why: "The nation's giant credit card companies want to perpetuate the myth that credit is free." Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. Merchants were soon joined by consumer rights advocates and others in opposition to the federal surcharge ban, which took effect in 1976. By the early 1980s, Senator Proxmire remarked that "[n]ot one single consumer group supports the proposal to continue the ban on surcharges," which effectively forced cash payers and debit users to subsidize the cost of credit cards by preventing merchants from imposing those costs directly on credit card users. *Id.* Ultimately, the FTC, Federal Reserve and White House

economists, as well as lawmakers from both parties, joined merchants in attacking the surcharge ban, and Congress affirmatively allowed the ban to lapse in 1984. See accompanying Declaration of Gary B. Friedman, at ¶ 7; *see generally*, *Expressions Hair Design et al. v. Schneiderman*, 2013 U.S. Dist. LEXIS 143415, at *11 (S.D.N.Y. Oct. 3, 2013).

But no sooner had the federal surcharge ban expired than the major credit card companies – by this time, Visa, MasterCard and American Express – all enacted or strengthened their own regulations, by-laws and contractual clauses effectively banning merchants from imposing surcharges on credit card transactions. The networks also employed fake-grass-roots "astroturf" organizations, with names like "Consumers Against Penalty Surcharges," to convince some 10 states during the mid-1980s to enact statutes banning merchant surcharges. Friedman Decl., ¶ 7. Accordingly, by the time Class Plaintiff Animal Land Inc. fired the first shot across the bow in an Atlanta federal court in May 2005 seeking to invalidate Visa's no-surcharge rule, the quest of U.S. merchants to obtain the right to surcharge credit card transactions appeared downright quixotic. By all appearances, merchant surcharging lay well out of legal reach -- buried underneath multiple layers of long-standing network rules and state laws.

And yet, as this Settlement Agreement comes before this Court for final approval, the entire edifice of anticompetitive private and public anti-surcharging restrictions in the United States is poised to collapse. *Animal Land* long ago blossomed into MDL 1720, a sprawling mass of litigation that finally settled this past year with Visa and MasterCard both agreeing to rescind their longstanding rules against merchant surcharging. The state statutes, meanwhile, have run into the U.S. Constitution, with District Judge Jed Rakoff declaring the New York statute unconstitutional in 2013, and Judge Gleeson finding "reason to believe" that the other state statutes will likewise "bit[e] the dust." *In re Payment Card Interchange Fee & Merch. Disc.*

Antitrust Litig., 2013 U.S. Dist. LEXIS 179340, at *60 (E.D.N.Y. Dec. 13, 2013). And while literally thousands of merchants complained in the MDL 1720 fairness proceedings that surcharge relief is meaningless until they are free to surcharge Amex – because of the way the new Visa/MasterCard surcharging rules are drawn – the instant settlement eliminates that impediment.

This settlement provides U.S. merchants for the first time ever with readily usable market-based tools for reversing the ever-escalating costs of payment card acceptance. Under the settlement here, merchants will be free to impose a separate charge to account for the costs of credit card acceptance, thus offering consumers a powerful and direct economic incentive to use debit cards – the cost of which is regulated by the Federal Reserve and far cheaper than credit card transactions. In fact, as shown by Class Plaintiffs' expert economist Dr. Alan Frankel, the average cost difference to a U.S. merchant between a credit and debit card transaction is a whopping 1.57% of the total purchase price. See Declaration of Alan S. Frankel, Ph.D., dated April 10, 2014, at ¶ 35. By driving consumers to debit, U.S. merchants stand to gain 1.57% of literally trillions of dollars over time.

The settlement is not perfect. In a perfect world, merchants would have the additional right to assess different surcharge amounts on different credit card brands, which the instant settlement does not allow. But the real price differences to merchants between and among credit card brands are, on average, very minor – especially when compared with the vast price differential between all credit cards, on the one hand, and debit cards on the other. So the settlement allows merchants to engage in the steering that most matters: moving customers away from credit cards to low-priced, and largely price-regulated, debit cards. And it allows merchants to engage in the type of surcharging they will *actually do:* applying a single, simple

surcharge amount to all credit card transactions. Moreover, as discussed below, the more nuanced surcharging strategies that are not permitted under this settlement – often referred to as "differential surcharging"[1] – have the disadvantage of remaining illegal in the states with anti-surcharging statutes, whereas those statutes cannot constitutionally ban the simple surcharging that is authorized by the settlement here. See below at 31-32.

The proposed settlement also does not obtain for merchants relief against the various non-surcharge-related anti-steering rules that Amex maintains, including rules against asking customers to use non-Amex products instead of Amex cards, or offering discounts for the use of competing credit card brands instead of Amex cards. These rules are at the heart of the Government's case against American Express, and the members of the class here will obtain full injunctive relief as to these rules from a DOJ trial victory or consent decree. Class Counsel has always recognized that these rules are anticompetitive, and important. Far from abandoning the challenge to these rules, Class Counsel has issued a vote of confidence in our colleagues at the Department of Justice. And if DOJ is *not* able to prevail on these claims, Class Counsel has no reason to believe that we would have prevailed. Accordingly, the value to merchants of the instant settlement is in no way undercut by the absence of relief as against the non-surcharge-related anti-steering rules.

By all indications, U.S. merchants are poised to make broad use of their newly won rights to impose surcharges upon credit card transactions. A recent market study performed by Olinger Group, a well respected market research firm, exhibited a 2-minute informational video to

[1] The term "differential surcharging" is misleading. What the settlement does not allow is *intra-credit-card* differential surcharging; *i.e.*, surcharging credit card brands differentially. What the settlement *does* allow is differential surcharging as between debit and credit. Nonetheless, we will generally use the phrase "differential surcharging" to mean intra-credit-card differential surcharging.

roughly 800 U.S. merchants from selected industries and then asked if they would surcharge. The video presented surcharging as automated and hassle-free, which is how vendors in the marketplace will present the option. The survey was directed at merchant sectors including dry cleaners, beauty salons, home improvement, auto repair, law firms and several others. *More than half* of those surveyed responded with an unequivocal yes – that they would surcharge. Of the remainder, most stated they would surcharge if some number of their competitors did. See The Olinger Group, Credit Card Merchant Surcharge Study, March 2014, annexed to the accompanying Declaration of Jude A. Olinger.

The easy-to-use surcharging solutions depicted in the Olinger video are almost at hand. As chronicled in the accompanying Declaration of Scott Levy, vendors in the marketplace are developing automated systems that can apply compliant surcharges, and the large Visa and MasterCard processing firms are just now beginning to roll out programs that allow for widespread carriage of surcharged transactions in compliance with Visa and MasterCard regulations. Levy Decl., ¶¶ 4-5. Once the instant settlement is finally approved, it is reasonable to expect that entrepreneurial service providers in the marketplace will be distributing marketing materials that look a lot like the Olinger video, to induce merchants to use their new tools broadly. And at the same time, Class Counsel will deploy a $2 million advertising fund, provided under the Settlement Agreement, to inform merchants of their new-found surcharging rights.

To be sure, it is impossible to predict with precision just how widespread surcharging will become, and just how much credit card volume will shift to debit as a consequence. But we do know that in Australia, within four years after the onset of the reforms there, some 10% of merchants (measured by volume) were already imposing surcharges, and that today – a decade

out – some 40% of merchants (measured by volume) are surcharging. See Frankel Decl., ¶ 41 and Fig. 4 (citing East & Partners 2013 Report). We also know that, when U.S. merchants institute a policy of surcharging credit card transactions, they will save 1.57% of the total sales amount on those transactions where the consumer switches to debit, and they will recover even more than that on those transactions where the consumer pays the surcharge. Frankel Decl., ¶¶ 35, 57.[2]

Finally, we know that U.S. credit card transaction volume is $2.4 trillion per year. See Frankel Decl., ¶ 17, n. 36 (citing Nilson Report # 1034 at 1, Friedman Decl. Ex. H). As a result, we know that merchants will save at least the following amounts, depending upon what percentage of U.S. merchants (by volume) come to engage in credit card surcharging:[3]

[2] The evidence shows that merchants simply *do not lose sales* from surcharging – just as one would expect, given that 40% of Australian merchants overall and 60% of large sophisticated merchants are surcharging. [redacted]

[3] The formula here is (i) the percentage of merchants surcharging (by volume), times (ii) 1.57% times (iii) $2.4 trillion, over a 10-year period that holds constant the percentage of merchants surcharging. These values do not include the spill-over benefits that non-surcharging merchants stand to realize as consumers modify their habits to use debit cards more broadly. Nor do they presuppose any gains from reduced rates on credit card fees.

% of US Merchants Surcharging	Savings Per Year	Savings Over Ten-Year Period
1%	$ 376.8 million	$3.76 billion
10%	$3.76 billion	$37.68 billion
20%	$7.53 billion	$75.36 billion
30%	$11.30 billion	$113.04 billion
40% (as in AU today)	$15.07 billion	$150.72 billion

Finally, the consideration of any class action settlement must take stock of the alternatives. The alternative to this settlement is not a better settlement; it is no settlement. And if there is no settlement, then Class Plaintiffs will be compelled to pursue litigation that is fraught with risks. At the outset, of course, are all of the risks that attend proving liability in the face of the defenses that American Express has so aggressively asserted, including its arguments regarding market power, market definition, the implications of "two-sided markets," and the competitive effects of its practices. And beyond those merits risks, continued litigation in this case would require Class Plaintiffs to overcome Amex's position that any given merchant may only seek to change the relevant contractual anti-steering provisions *as to itself*, and not as to the marketplace more broadly. While Class Plaintiffs have strongly contested the point – and we do believe we have the better of the argument – it would be reckless in the wake of *Italian Colors* to write off Amex's chances of winning that particular battle, which is presently *sub judice* on this Court's docket. See Amex Reply Mem., 8/5/2013, DE 265. Moreover, any resolution of that issue is immediately appealable in either direction and, if recent history is any guide, could well delay resolution of the case for years to come.

II. Procedural History

A. *Italian Colors and Marcus Corp. Cases*

In August 2003, a group of small merchants including Italian Colors Restaurant filed suit in the Northern District of California challenging certain applications of American Express's Honor All Cards rule under the antitrust laws. Those actions were then transferred to the Southern District of New York, *Italian Colors Rest. v. Am. Express Co.*, 2003 WL 22682482 (N.D. Cal. Nov. 7, 2003), where other similar cases were filed and consolidated by Judge Daniels under the caption *In re American Express Merchants Litig.*, Master File No. 03-CV-9592 (the "*Italian Colors* cases").

The plaintiffs in the *Italian Colors* cases – like all small merchants subject to the standard form American Express card acceptance agreement during that time frame – were bound by arbitration clauses banning collective action and mandating one-on-one arbitral proceedings. On April 30, 2004, American Express moved to compel arbitration in the *Italian Colors* cases, and Judge Daniels granted that motion on March 16, 2006. *In re American Express Merchants Litig.*, 03-CV-9592, DE 20 and DE 34.

On July 13, 2004, The Marcus Corporation filed suit. *Marcus Corp. v. American Express Co. et al.*, 04-CV-05432 (GBD) (S.D.N.Y.). Unlike the smaller merchant plaintiffs in the *Italian Colors* cases, Marcus Corp. was not at that time subject to any arbitration provision. Accordingly, *Marcus* proceeded with discovery as the *Italian Colors* plaintiffs commenced their lengthy appellate journey challenging American Express's arbitration policy.

The point behind the *Marcus* case, and the parallel *Italian Colors* cases, was to give merchants a competitive tool for combating card acceptance costs. Specifically, plaintiffs argued that certain applications of American Express's Honor All Cards rule harmed competition by

allowing Amex to offer inflated fees to prospective bank-issuers of Amex-branded revolving credit cards, thus causing Visa and MasterCard to increase the merchant fees from which they compensate banks, and generally inciting an ever-escalating upward spiral in merchant interchange fees.[4] As Judge Daniels recognized in denying Amex's motion to dismiss, plaintiff contended that American Express's tying arrangement worked a "radical realignment" of the market by "forcing MasterCard and Visa to either price their own services to merchants at inefficiently high levels, or risk losing all of the banks, and the U.S. credit card market, to American Express." *Marcus Corp. v. American Express Co.*, 2005 U.S. Dist. LEXIS 13170, at *7-8, 11 (S.D.N.Y. July 5, 2005).

Over the course of the ensuing five years, the parties in *Marcus* engaged in exceedingly hard-fought litigation. The litigation record included millions of pages produced by American Express and millions more produced by third-parties, including the complete record from *In re VisaCheck/MasterMoney Antitrust Litig.*, 96-CV-5238 (JG) (E.D.N.Y.). There was substantial deposition discovery of American Express, Marcus Corp. and third parties, in addition to which plaintiff requisitioned some seventy high-relevance depositions from *American Express Travel Related Services, Inc. v. Visa USA Inc. et al.*, 04-CV-08967 (BSJ) (S.D.N.Y.), which was proceeding contemporaneously, thus obviating scores of additional fact depositions in *Marcus*. In addition to discovery motions, the parties fully briefed and argued multiple substantive motions, including motions to dismiss on statute of limitations grounds, and a full-blown class certification motion following multiple expert depositions and reports. Further, after an

[4] As part of this same course of conduct, and to blaze a trail for the bank-issued Amex cards, Amex launched proprietary mass-market revolving credit card brands subject to the HAC tie, including its Blue and Costco cards. Class Plaintiffs based damages claims upon those tied products, arguing that they could not have been launched at prices exceeding Visa "plain vanilla" credit card prices absent the illegal tie.

exchange of extensive expert reports on merits and damages issues, and multiple *Daubert* motions by the defendants (all of which were denied), both sides moved for summary judgment, and both of those motions were fully briefed and argued in January 2009.

Also in January 2009, the Second Circuit issued the first of a series of decisions finding that the class action waiver contained in the American Express arbitration clause was unenforceable against the *Italian Colors* plaintiffs. *In re American Express Merchants Litig.*, 554 F.3d 300 (2d Cir. 2009). Some 15 months later, the Supreme Court then granted certiorari, vacated the Second Circuit's decision and remanded for reconsideration of in light of certain intervening authority. *American Express Co. v. Italian Colors Restaurant*, 130 S. Ct. 2401 (May 3, 2010). After another round of briefing, the Second Circuit in March 2011 then reaffirmed its original ruling in *In re American Express Merchants Litig.*, 634 F.3d 187 (March 8, 2011) ("*Amex II*"). Shortly after that, the Supreme Court decided *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), broadly upholding an arbitration clause and class action waiver. Following *Concepcion*, the Second Circuit then called for yet another round of briefing, after which it yet again reaffirmed its earlier decisions. *In re American Express Merchants Litig*, 667 F.3d 204 (Feb. 1, 2012) ("*Amex III*"). After a motion for en banc reconsideration was narrowly defeated by a deeply divided Court of Appeals, *In re American Express Merchants Litig*, 681 F.3d 139 (2d Cir. 2012) ("*Amex IV*"), American Express successfully petitioned the Supreme Court for certiorari, and, on June 20, 2013, the Court reversed the Second Circuit's decision. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

B. *Anti-Steering Rules Challenges*

During the course of discovery in the *Marcus* case, it became apparent to Class Counsel and their economic experts that the rules circumscribing the ability of merchants to steer

transactions to lower-cost payment forms were at the root of the competitive ills plaguing the payments industry. Based on the evidence uncovered in *Marcus*, plaintiffs' merits experts in that case opined that American Express's rules against steering operated to largely insulate it from competitive pricing pressures, and warranted a finding of substantial market power – economic arguments that would be echoed years later in the summary judgment arguments proffered to this Court by the Individual Merchant Plaintiffs.

In May 2005, Animal Land Inc., a pet transportation business based in Atlanta (and a Class Plaintiff here as well), filed an action against Visa entitled *Animal Land, Inc. v. Visa USA, Inc.*, 05-CV-01210 (JOF) (N.D. Ga.) challenging Visa's rules against surcharging. That action – which was followed in short order by cases challenging MasterCard's similar rule and cases that challenged the so-called "default interchange rules" of both networks – was the first case filed in what later became MDL 1720.

But as litigation challenging anti-steering and anti-surcharging rules broke out in 2005-06, Marcus Corp. was not at liberty to amend its complaint to challenge American Express's similar rule.[5] So instead, Class Counsel filed cases in late 2005 challenging American Express's rules restraining merchant surcharges in the MDL 1720 court, on behalf of other small merchant clients. After conferring with the parties in MDL 1720 and Magistrate Judge Orenstein, and American Express, Class Counsel then withdrew those actions and re-filed them in the Southern District of New York. Although the filings were marked related to *Marcus*, they were ultimately reassigned to Judge Pauley under the master file name *Performance Labs, Inc. et al. v. American*

[5] By early 2006, subsequent to a significant asset divestiture, Marcus Corp. had become subject to the standard form American Express card acceptance agreement applicable to smaller merchants, thus obligating it to arbitrate any new claims. By informal agreement of the parties, defendants did not seek to enforce the arbitration agreement as to the tying claims in *Marcus*, and Marcus Corp. did not seek to amend its complaint to add the anti-steering rules claims in the *Marcus* action.

Express Co., et al., 06-CV-2974 (WHP) (S.D.N.Y.) and then consolidated with additional filings as *In re American Express Anti-Steering Rules Antitrust Litig.*, 06-CV-2974 (WHP) (S.D.N.Y.) ("*Amex ASR*").

Because the merchants challenging Amex's anti-steering rules were all subject to the arbitration clause, the *Amex ASR* case was largely stayed from its inception in 2006 until the Second Circuit ruled in *Italian Colors* in January 2009. At that point, the parties commenced discovery in earnest before Judge Pauley. Also, in that time frame, a handful of larger merchants (who were either not bound by Amex's arbitration clause or as to whom Amex did not invoke that clause) filed claims that were substantially identical to the *Amex ASR* complaint in the Eastern District of New York, where they were assigned to this Court. *Rite Aid Corp., et al. v. American Express Travel Related Services, et al.*, Master File No. 08-CV-2315 (NGG) (E.D.N.Y.). Collectively, these plaintiffs are referred to below as the "Individual Merchant Plaintiffs."

In October 2009, relying on evidence adduced in *Marcus* and this action, Class Counsel submitted to the Justice Department – whom it understood was investigating Visa and MasterCard's rules relating to merchant steering – a white paper entitled "Why The Antitrust Division Should Challenge American Express's Anti-Steering Rules." Following extensive investigation of all three networks, the Justice Department announced on October 4, 2010 that it and seventeen plaintiff states had entered into consent decrees with Visa and MasterCard and filed an enforcement action against American Express challenging certain of its rules relating to merchant steering. *United States v. American Express Co.*, 10-CV-4496 (NGG) (E.D.N.Y.). Because both the DOJ's case and the Individual Merchant Plaintiffs' cases were pending in this

Court, the *Amex ASR* plaintiffs initiated proceedings before the Judicial Panel on Multi-District Litigation, which then transferred the *Amex ASR* case to this Court.

Fact discovery in the *Amex ASR* case has been extensive, to say the least. Pursuant to laboriously negotiated discovery coordination protocols with defendants, the Individual Merchant Plaintiffs and the Department of Justice, the Class Plaintiffs participated in 120 depositions and marshaled a record that included more than 20 million pages of new documents.

C. ***Settlement Process***

Back in the fall of 2006, after Judge Daniels granted the motion to compel arbitration in *Italian Colors* and before the initial Second Circuit decision, with discovery in *Marcus* in full swing and the first *ASR* case just then filed, the parties engaged in a series of face-to-face meetings designed to explore potential resolution. The meetings did not bear fruit, and the parties agreed to resume the conversation after the arbitration issue was finally resolved. That juncture would arrive seven years later.

The Supreme Court's June 2013 ruling in *Italian Colors* precipitated the instant settlement. First of all, the Court's broad ruling upholding Amex's collective action ban made it clear to Class Counsel that no damages class action was realistically feasible in *Amex ASR* or in *Marcus*. By 2013, class plaintiffs had discovered that virtually every Amex-accepting merchant in the U.S. was subject to a binding arbitration clause with American Express. So even if a non-arbitration-bound named plaintiff were free to proceed in court, it is likely Amex's arbitration clause would be upheld as against substantially all of the members of a putative class, such that a putative damages class could not even meet the numerosity requirement of Rule 23(a)(1).

However, it was also Class Counsel's judgment that a class action seeking market-wide injunctive relief remained viable, under *Italian Colors*. Thus, Class Plaintiffs vigorously resisted

Amex's motion to compel arbitration in the *Amex ASR* case, arguing that the *Italian Colors* decision and the language of the Card Acceptance Agreement do not in fact foreclose an action seeking broad injunctive relief. The motion – which presents difficult and complex issues, carries the potential for yet another trip to the Supreme Court, and threatens the ability of 99% of U.S. merchants to ever obtain any relief against Amex's surcharging rules – was fully briefed in August 2013, and is currently *sub judice* before this Court. (DEs 262-269).

It is against this backdrop that the parties have agreed to settle the instant litigation. The parties thus engaged in intensive negotiations throughout the summer and fall of 2013, with the assistance of mediator Kenneth R. Feinberg. Mr. Feinberg presided over numerous in-person and telephonic conferences, commencing before the Supreme Court released its *Italian Colors* ruling, and continuing to the present. A declaration from Mr. Feinberg is submitted together with the parallel Motion For Attorneys' Fees And Costs.

III. Settlement Terms

The Settlement Agreement, Friedman Decl., Ex. A, allows merchants to impose a surcharge upon Amex credit and charge card transactions so long as: (i) the amount of the surcharge does not exceed the discount rate applicable to that transaction and the amount of the surcharge the merchant imposes on any other credit card brand; (ii) the surcharge is fully disclosed, on the same terms that the merchant is required to disclose Visa and MasterCard surcharges; and (iii) the merchant provides 30 days notice to Amex that it intends to surcharge. SA ¶ 8. Debit cards, including pre-paid or gift cards, may not be surcharged unless or until similar cards on competitors' brands are subject to surcharging. See SA ¶ 8 and Amex Merchant Regulations, Friedman Decl., Ex. B at §3.2.

Meanwhile, Amex is prohibited from offering a traditional debit card subject to its Honor All Cards policy, lest such an offering undermine the surcharging relief provided in the agreement. SA ¶ 8. Specifically, Class Counsel was concerned that Amex might launch a rewards-bearing, high-fee, non-Durbin-regulated traditional debit card product and advertise that that product is "surcharge free." The appeal is obvious. And while Class Plaintiffs would take the position that such a campaign would constitute new conduct, outside the scope of the Release, the Settlement Agreement makes clear that merchants would be free to refuse to accept any such new product, irrespective of Amex's Honor All Cards policy.

The agreement also provides that Amex and a merchant may agree to waive the right to surcharge, provided that the contract is individually negotiated, for a set term of years and supported by actual consideration, *e.g.*, a discount rate reduction. SA ¶ 10. An obligation of good faith and fair dealing is expressly made applicable to any such contracts, SA ¶ 90, to ensure (as just one example) that Amex cannot threaten merchants with rate increases to induce them to enter agreements not to surcharge. And in fact, Class Counsel has received binding written acknowledgement from Amex counsel that any such threat would violate the contractual covenant of good faith and fair dealing. Letter from Philip C. Korologos dated December 16, 2013, Friedman Decl., Ex. W.

The release is a broad one, "specifically intended . . . to preclude all members of the Settlement Class from seeking . . . equitable relief prior to the Release Termination Date (which date shall be a minimum of ten years following the Provisions Change Date) with respect to any rule or provision that was or could have been challenged in these Actions" subject to the "identical factual predicate doctrine as applied to the [*Amex ASR* case] and the Marcus Action." SA ¶ 26. The release duration may also extend beyond ten years if Visa or MasterCard's rules

remain unchanged, as well as Amex's rules, and so long as the equitable release in the MDL 1720 agreement remains in effect and has not been abrogated. SA ¶¶ 26, 1(vv). Conduct that is undertaken subsequent to final approval that is consistent with the rules as they exist subsequent to final approval, is released, and cannot form the predicate of an injunctive or damages claim. SA ¶¶ 26, 27.

There is no release whatsoever of any right that any class member presently has to sue for money damages. SA ¶ 40. On the contrary, the Agreement specifically contemplates that a merchant may pursue damages claims against American Express based on the anti-steering rules and Honor All Cards rules (as those rules exist before the rules changes take effect) under whatever dispute resolution terms are applicable to that merchant. SA ¶ 40. Recognizing that most merchants' agreements call for binding arbitration, the Agreement provides that arbitral claimants shall be entitled to receive the extensive evidentiary and litigation record that Class Counsel has amassed in these cases, subject only to the claimant's agreement to be bound by the applicable Protective Order (and the Court's agreement to amend that Order to reflect this arrangement). SA ¶ 68.

The Settlement Agreement also recognizes that the Department of Justice is pursuing the elimination of certain American Express "non-discrimination provisions," or anti-steering rules, and it ensures that class members will receive the full benefit of whatever injunctive relief DOJ is able to obtain from American Express after trial or via a consent decree. SA ¶ 35.

In addition, American Express has agreed to pay the attorneys' fees and costs incurred by Class Counsel and the dozens of law firms whose efforts over the past 10 ½ years have made this settlement possible, up to a cap of $75 million. SA ¶ 55. It will also pay (and in fact has paid) $2 million in costs associated with the provision of notice to the members of the class, SA ¶ 17, and

will pay an additional $2 million as a fund "to be used solely by Class Counsel for the purpose of educating members of the Settlement Class about" their new-found surcharging rights. SA ¶ 18.

IV. The Standards for Assessing Whether a Class Action Settlement is Fair, Reasonable, and Adequate

The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.") "Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation." *In re Luxottica Grp. S.p.A. Sec. Litig.*, 233 F.R.D. 306, 310 (E.D.N.Y. 2006).

The standard employed in the Second Circuit for the evaluation of a proposed settlement is clear: "Before such a settlement may be approved, the district court must determine that a class action settlement is fair, adequate, and reasonable, and not a product of collusion." *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000), citing Fed. R. Civ. P. 23(e)(2). "We have recognized a presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery. Such a presumption is consistent with the strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (internal quotations and citations omitted); *Wal-Mart* 396 F.3d at 116 (same). "So long as the integrity of the arm's length negotiation process is preserved . . . a

strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that while a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). In assessing a settlement, then, the court should neither substitute its judgment for that of the parties who negotiated the settlement, nor conduct a mini-trial on the action's merits. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (court should not substitute its "business judgment for that of counsel, absent evidence of fraud or overreaching"); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y. 2003) ("absent evidence of fraud or overreaching, courts consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of [class] counsel"); *In re McDonnell Douglas Equip. Leasing Sec. Litig.*, 838 F. Supp. 729, 737 (S.D.N.Y. 1993) ("in analyzing a proposed [class] settlement, courts have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or overreaching").

In determining if a proposed settlement is fair, reasonable and adequate, courts in this Circuit look to the factors enumerated in *Grinnell*, 495 F.2d at 463. As modified for application to cases that do not involve a damages fund, "these so-called *Grinnell* factors include: (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, [and] (6) the risks of maintaining

the class action through the trial." *Joel A.*, 218 F.3d at 138, citing *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 684 n.1 (2d Cir. 1977).[6] In finding that a settlement is fair, not every factor must weigh in favor of settlement; "rather the court should consider the totality of these factors in light of the particular circumstances." *Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003).

In this case, it is clear that the proposed settlement is entitled to the strongest presumption of fairness, and that consideration of the applicable *Grinnell* standards weighs unequivocally in favor of final approval.

V. The "Presumption Of Fairness" Is Warranted Because The Settlement Was Negotiated At Arms' Length By Experienced Counsel After Meaningful Proceedings Before An Experienced And Respected Mediator

Following a full decade of highly adversarial litigation, this settlement agreement was negotiated over a period of six months between experienced and fully-informed counsel assisted by a nationally known and well respected mediator, Kenneth Feinberg. As Mr. Feinberg recites in his Declaration in this matter, "the lawyers on both sides were deeply committed to their long-held positions. To say they dealt with each other at arms' length is a real understatement. To say that this case was hard-fought is even more of an understatement. It was my observation that every inch of ground in this negotiation was earned; nothing was given." Feinberg Decl., ¶ 10.

By the time the parties got to the bargaining table, they were in an excellent position to evaluate the prospects of continued litigation. Over the 10-plus years since the initial case

[6] In addition to these six factors, the *Grinnell* test applied in damages cases also includes three additional factors which were omitted by the Second Circuit in the injunctive-only *Joel A.* case: "(7) the ability of the defendant to withstand a greater judgment . . . ; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . ." *Grinnell*, 495 F.2d at 463.

subject to this settlement was filed, Class Counsel participated in more than 160 depositions; reviewed and produced documents totaling in the tens of millions of pages; fully briefed and argued cross-motions for summary judgment supported by hundreds of exhibits; extensively briefed and argued motions to dismiss on statutes of limitations and arbitration grounds; prepared numerous expert reports and took and defended multiple expert depositions on merits and class certification issues; fully briefed and argued a class certification motion; and prosecuted an appeal through the Second Circuit (three separate rounds of briefing plus oral argument) and to the U.S. Supreme Court (two separate rounds of certiorari briefing and one full-blown merits appeal).

Informed as they were by all of these experiences, Class Counsel's negotiation of the instant settlement is entitled to the presumption of fairness. *See McReynolds,* 588 F.3d at 803 (presumption of fairness warranted "after meaningful discovery.") The presumption is further warranted by the testimony of Mr. Feinberg. Courts recognize that the use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's length and without collusion." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D.N.Y. 2008).

VI. Evaluation Of The Applicable *Grinnell* Factors Confirms That The Settlement Satisfies The "Fair, Adequate and Reasonable" Standard

Consideration of the *Grinnell* factors identified by the Second Circuit in *Joel A.* leaves little room for doubt that the settlement is "fair, adequate and reasonable" within the meaning of Rule 23(e). These factors – putting aside the "reaction of the class" factor, which is unripe for consideration until objections are filed – fall into two main groups: (a) the scope of the litigation to date and the likely scope into the future, absent settlement; and (b) the risks of establishing liability and relief, absent settlement.

A. **Scope Of Litigation Factors (*Grinnell* Factors 1 and 3)**

Approval is warranted in light of "(1) the complexity, expense and likely duration of the litigation" as well as "(3) the stage of the proceedings and the amount of the discovery completed." As set forth above, the litigation efforts to date have been staggering in their scope. And it stands to reason that a class trial or trials seeking sweeping relief for 4.2 million Amex merchants representing all industries, sizes and geographies would be likewise sprawling. Proceedings to date have run more than 10 years. Going forward, it is difficult to estimate what the timeline would be, but "many years" is a safe bet. In fact, truly massive additional delay is likely based upon the motion to compel arbitration of the Class Plaintiffs' equitable claims that was *sub judice* at the time this settlement was reached. The resolution of that motion would engender appeals that could very plausibly end up back in the U.S. Supreme Court on the open (and arguably cert-worthy) issue of whether an arbitration clause may force a party to relinquish the right to sue for broad relief under Clayton Act § 16.

The expense of continued litigation, meanwhile, is enormous. To date, compensable out-of-pocket expenses for expert witnesses, database management, travel and other items exceed $5 million, and the approximate value of lawyer-hours spent over the past decade of litigation is either $83.5 million or $99 million (depending on how one accounts for the time value of money), as discussed in more detail in the accompanying petition for attorneys' fees and costs. Here again, it is impossible to speculate what the costs and fees would be going forward but they will be very extensive on any scenario that does not posit Class Plaintiffs losing a dispositive motion in the near future.

Finally, while the extraordinary "amount of the discovery completed" was discussed above, the *quality* of the discovery taken in these cases relates directly to the relief achieved in

this settlement. In particular, painstaking investigation into Amex's real-world experience with legal surcharging in Australia (including many depositions in Hawaii and elsewhere of Amex-Australia witnesses) yielded unique evidence of the pro-competitive power of surcharging -- particularly where price regulation has driven a large gap between the pricing on competing products. Thus, in Australia, [redacted] central bank regulation of Visa and MasterCard credit card interchange rates opened up a large gap in pricing between those products and Amex cards, giving merchants an incentive to surcharge Amex cards and drive traffic to Visa/MasterCard.[7] Likewise, in the U.S., the Federal Reserve's regulation of debit card interchange has opened up a large gap between credit cards and debit cards, giving merchants an incentive to surcharge credit cards and drive traffic to debit. Discovery likewise established that debit and credit are extremely close substitutes – indeed, one of the few areas of agreement between the experts for Amex and the Individual Merchant Plaintiffs was that consumers can readily be switched between debit and credit usage.[8]

[7] *See, e.g.,* [redacted]

[8] Individual Merchant Plaintiffs argued – as the Class Plaintiffs have always argued as well—that debit and credit cards *would* be considered part of the same relevant market *if* the surcharge and steering restrictions were abolished. [redacted] Amex's argument is that debit and credit cards should be considered part of the same relevant market *today*, because the challenged restraints cannot (as a legal or economic matter) be considered in defining a relevant product market.

The structure of the settlement, then, very much grew out of the lessons learned in the discovery process. Class Counsel not only had ample opportunity through the discovery process to learn the strengths and weaknesses of its case, but also – and even more importantly – to understand the structural elements that promise merchants real value in the real world. In a word, we learned that what really matters is a settlement that provides merchants the ability to surcharge credit cards (even if monolithically) in favor of debit cards.

B. **Litigation Risk Factors (*Grinnell* Factors 4-6)**

The proposed settlement is further clearly reasonable in light of "(4) the risks of establishing liability, (5) the risks of establishing damages, [and] (6) the risks of maintaining the class action through the trial." *Joel A.*, 218 F.3d at 138.

1. ***Liability Risk***

While Class Counsel has always been unpersuaded by Amex's arguments that it lacks market power and that its rules relating to surcharging are pro-competitive, it is clear that these defenses pose very significant risks to the Class Plaintiffs. As this Court is aware from the summary judgment motions that Amex made in the Government and Individual Merchant Plaintiff cases, Amex is aggressively pursuing these defenses with some of the world's most highly regarded economic experts and lawyers. Its arguments are well presented, cogent, and likely to appeal to certain members of the Court of Appeals. *See, e.g.*, *In re Visa Check-MasterMoney Antitr. Litig.*, 280 F.3d 124, 147 (2d Cir. 2001) (Jacobs, C.J., dissenting from affirmance of class certification and expressing skepticism of plaintiffs' economic theories). Even if Amex loses at the district court level, it has long been Class Counsel's perception that Amex will emphasize that no appellate court has yet provided an in-depth treatment of the proper approach to market definition and market power in a so-called two-sided market, and it will

invite a thorough economic exploration of what is arguably *terra nova* – a strategy that not only highlights the risk that Amex might convince an appellate tribunal that it lacks substantial market power, but one that underscores the tremendous length of the likely road ahead.

2. ***Damages/Relief Risk***

The Second Circuit in *Joel A.* seemingly included as a *Grinnell* factor the risk of "establishing damages," although that settlement did not include any release of damages claims. 218 F.3d at 142 (the "release explicitly preserves the right of an individual plaintiff to sue for damages") (internal punctuation omitted). Arguably, the logic is that even in a case that has no damages release, it may be relevant to ascertain whether the settling class plaintiffs *could have* obtained a class damages award. If so, this factor militates strongly in favor of approval.[9]

It is beyond serious dispute that a merchant class action for damages is simply unavailable in the wake of *Italian Colors*. The overwhelming majority of Amex-accepting merchants in the U.S. are bound by an arbitration clause. The remainder may only seek damages in accordance with the terms of their dispute resolution provisions, which invariably mandate one-on-one arbitration. The instant settlement makes those arbitrations as viable and realistic an option as they can possibly be, expressly providing each individual arbitral claimant the right to access for use in its arbitration all of the copious data and evidence that Class Counsel has marshaled over the years of this litigation. The litigation road to damages, by contrast, is simply a dead end after *Italian Colors*.

The risk of being unable to obtain any injunctive relief that would apply across the market is also extremely high, even if liability can be established. On its pending motion to

[9] It is also possible that the Court of Appeals simply misspoke, and really meant the risk of establishing entitlement to injunctive relief. See *Marisol A. v. Giuliani*, 185 F.R.D. 152, 164 (S.D.N.Y. 1999) (enumerating factor as "Risk Of Establishing Damages [Remedies]") (brackets in original). In any event, we discuss that injunctive relief risk immediately below.

compel arbitration in *Amex ASR*, American Express contends that no merchant has any right to seek injunctive relief that would affect other merchants, but may seek relief *only* as to the contractual terms applicable *to that merchant*. See Amex Mem. dated 8/5/2013, DE 262; Reply Mem., DE 265. Specifically, Amex argues that the injury-in-fact claimed by any individual merchant (whether a large Individual Merchant Plaintiff or a small merchant) can be redressed by granting that individual merchant the right to steer or surcharge its own customers, and that marketwide relief is therefore not available in a non-class case, within the meaning of applicable case law. Amex Reply Mem, DE 265 at 4-7. Further, Amex argues that a 23(b)(2) class action aimed at changing its marketwide rules is unavailable under the text of the Card Acceptance Agreement and the Supreme Court's *Italian Colors* decision. *Id.*

Class Counsel vigorously opposed the motion, and we continue to believe we have the better of the argument. But the magnitude of the risk here is patent. Further, having made the round-trip to the Supreme Court in this matter twice already, it was Class Counsel's considered opinion that a Supreme Court grant of certiorari on this injunctive issue was not unlikely. And that assumes that Class Plaintiffs would prevail not only before this Court but also at the Circuit Court level, where the prospects of any appeal in this basic area are highly unpredictable, as the splintered *en banc* proceedings in *Italian Colors* demonstrated. *Amex IV*, 681 F.3d at 139 (opinion of Pooler, J.), 142 (Jacobs, C.J., dissenting), 149 (Cabranes, J. dissenting), 149 (Raggi J. dissenting).

3. *Class Certification Risks*

The sixth *Grinnell* factor refers to the "risks of maintaining the class action through the trial." Here, the risk of being unable to certify a class are significant for all the same reasons that

are discussed above relating to Amex's current motion to compel arbitration (inasmuch as the agreements ban class proceedings on their face).

4. *Marcus Action-Specific Risks*

Lastly, in the absence of this settlement, there is an overwhelming risk that merchants would receive no value from the *Marcus* litigation. While Marcus Corp. itself is not bound by an arbitration clause as pertains to the case challenging the Honor All Cards rule (see above at 11, n. 5) the fact is that virtually all members of the putative class Marcus seeks to represent *are* bound by the clause. In the judgment of Class Counsel, it is likely that a renewed motion by Marcus Corp. to certify a damages class would fail on numerosity grounds. *See* Fed. R. Civ. P. 23(a)(1).

And on top of that risk, Amex has of course asserted formidable merits defenses to the Honor All Cards case in its summary judgment motion, including that it lacks substantial market power; that plaintiffs failed to establish two separate products; that plaintiffs failed to establish likely anticompetitive effects of the coercive tie; and that the claim is time barred. In addition, while Marcus Corp.'s 2008 motion for class certification was denied not on the merits but merely as a scheduling matter, and subject to renewal, Amex did assert powerful defenses to that motion which it would reassert if the motion were revived. Among other defenses, Amex argues that if the relevant products were untied, such that the price of the tied product were to fall (which is the nub of plaintiffs' damage theory, *see* above at 9, n. 4), then the price of the tying product would rise – in which case, the effect on merchants could only be gauged by an individualized inquiry that looks at the payment mix at each merchant. While Plaintiffs submitted expert testimony and evidence to rebut that hypothesis in 2008, it is totally unclear how that issue would play out if litigated today.

VII. Discussion Of Anticipated Objections

It is premature to discuss the reaction of the members of the Class, as objections are not due to be filed until June 6, 2014 under the Court's scheduling order. DE 334. However, the Individual Merchant Plaintiffs have already raised certain issues in the preliminary approval process, representatives of certain objectors in the MDL 1720 case have indicated that they intend to likewise object here (letter to Court from Jeffrey I. Shinder, dated 2/21/14, DE 337) and a handful of early objections have been received already. Accordingly, we can address here at a high level of generality some of the basic expected objections in this case.

A. Value Of Surcharging Rights In General (MDL 1720 Redux)

Certain objectors in MDL 1720 voiced skepticism concerning the value to U.S. merchants of the right to surcharge – a theme that is echoed in some of the objections already filed here. There were three main areas of argument.

1. The "Amex Problem": First, many merchants pointed out that the new Visa/MasterCard surcharging rules force Amex-accepting merchants to surcharge Amex transactions as a condition of being permitted to surcharge Visa and MasterCard transactions, and they argued that they are unable to surcharge Amex transactions because of Amex's rules. *Payment Card Interchange*, 2013 U.S. Dist. LEXIS 179340 at *64-66. Plainly, with the instant settlement, this objection is now moot.

2. State Statutes: Second, many merchants complained that they cannot use the new surcharging tool because they operate in states, like New York, that have enacted bans on surcharging. But Class Counsel and colleagues have attacked those state statutes as unconstitutional, and Judge Rakoff of the Southern District recently struck down the New York statute on First and Fourteenth Amendment grounds in *Expressions*. Indeed, observing in his

final approval decision that the New York statute "has bitten the dust in the brief interval since the fairness hearing," Judge Gleeson opined that "there is reason to believe that [the other] state-law impediments to a full deployment of the proposed relief" will likewise be held unconstitutional, adding that "[n]o-surcharge laws are not only anti-consumer, they are arguably irrational." *Payment Card Interchange*, 2013 U.S. Dist. LEXIS 179340 at *60. And since that time, identical constitutional challenges have indeed been filed to the anti-surcharging laws in Florida, Texas and California. *Dana's Railroad Supply v. Bondi*, 14-CV-00134-RH-CAS (N.D. Fla.); *Rowell v. Abbott*, 14-CV-00190-LY, (E.D. Tex.); *Italian Colors Restaurant v. Harris*, 14-CV-00604 (N.D. Cal.). And plaintiffs' counsel in all those cases (including Class Counsel here) have stated publicly their intent to challenge each and every such state antisurcharging law.

3. Merchant Interest Level. Third – a distant third, in terms of the amount of attention given to each objection – some merchants expressed skepticism concerning the extent to which U.S. merchants are likely to deploy surcharges in the near term. But there are strong reasons (many of which were not available to Judge Gleeson in MDL 1720) to expect widespread adoption of surcharging, including:

- In Australia, where observers were similarly skeptical about the uptake of surcharging at the start of the reform period, the latest data discloses that 60% of large merchants currently surcharge, and 40% of all merchants currently surcharge. Frankel Decl., ¶ 41 and Fig. 4.; East & Partners, Australian Merchant Payments, Market Analysis Report, December 2013, p. 31.
- In a recent study by market research firm Olinger Group, more than 60% of merchants who saw a 2-minute informational video stated that they would surcharge. Of the remainder, most stated they would surcharge if at least some of their competitors did. The video presented surcharging as automated and hassle-free, as vendors in the marketplace will surely present the option, and it was

exhibited to merchant sectors including dry cleaners, beauty salons, home improvement, auto repair, law firms and several others. Olinger Decl., Ex. 1.

- In industries where Visa, MasterCard and American Express have allowed merchants for some years now to assess "convenience fees" – really just a euphemism for permissible surcharges – these fees are in fact imposed on substantial numbers of credit card transactions in those industries. In other words, where merchants *may* impose such fees, they *do* impose them, in substantial numbers. Frankel Decl., ¶ 36.

- Enforcement data obtained in cases challenging state anti-surcharging laws show considerable levels of merchant surcharging in clear violation of state laws. Florida officials, for example, sent 41 cease and desist letters to merchants for surcharging between January and June 2013 alone. Friedman Decl., ¶ 8.

- [redacted]

- In the competitive acquiring marketplace in the U.S., entrepreneurial service providers are gearing up right now to offer services that automate the surcharge process, and are likely to advertise and promote surcharge-related services. Levy Decl., ¶¶ 4-5.

- Pursuant to the Settlement Agreement, Class Counsel will deploy a $2 million advertising fund, earmarked to inform merchants of their new-found surcharging rights. SA, Friedman Decl., Ex. A, ¶ 18.

B. Lack Of Differential Surcharge Rights

The Individual Merchant Plaintiffs have indicated that they will object to the extent that the instant settlement does not allow them to engage in what the IMPs call "differential surcharging" – *i.e.*, the imposition of surcharges that treat American Express credit cards less favorably than surcharges upon other *credit* card brands. This objection overlooks several key realities.

1. *The Credit-Debit Rate Differential Swamps Interbrand Rate Differentials*

First, the relative price differences to merchants between all credit cards and all debit cards absolutely swamp any differences between and among the credit card brands. As discussed in the accompanying report of Dr. Alan Frankel, at 34, n. 76, the average *mix-adjusted* price differential between Amex and MasterCard is reported by Amex as being just [redacted] basis points ([redacted]%), and the mix adjusted premium over Visa is only [redacted] basis points ([redacted]%).[10] [redacted] And as Dr. Frankel shows, even if one failed to adjust for mix, the premium over Visa, MasterCard and Discover would *still* only be between [redacted] basis points. See Frankel Decl., at 18, Fig. 3. These are extremely small differences, and there is no evidence anywhere in the world that differentials of this magnitude

[10] Mix adjustment, as used in this context, takes account of the product mix each merchant sees on Amex. So for example, a *mix adjusted* comparison would compare Amex corporate cards with Visa commercial cards, and Amex Membership Rewards cards with Visa Signature cards. A mix-adjusted analysis takes the product-mix breakdown of Amex (corporate vs. high-rewards vs. plain-vanilla-revolving-credit vs. pre-paid cards, etc.) and asks what the fees would be if Visa rates were applicable to that particular mix of transactions. A *non-mix-adjusted* analysis, by contrast, flatly assumes that all Visa transactions occur at the average Visa rate. Failing to adjust for mix overlooks that a surcharged Corporate Card holder will presumably switch to a Visa commercial card, and a surcharged Platinum Card holder will presumably switch to Visa Signature.

(much less the more accurate, mix-adjusted magnitudes) would induce merchants to engage in differential surcharging, even if it were permitted.

The spread between credit cards and debit cards, on the other hand, is 157 basis points on average. Frankel Decl., ¶ 35. That spread is even greater than the spreads that prevailed in Australia between Amex and Visa/MasterCard at their high water mark. And as has been seen, those Australian differentials – the "giant gaps" that opened up in Australia -- were broad enough to incite widespread surcharging activity by merchants, and huge consequent cost savings.

The upshot here is two-fold. First, if merchants use the tools provided by this settlement and impose a single surcharge on all credit card transactions without imposing any surcharge on debit card transactions, the cost savings they will realize are more significant, by orders of magnitude, than what merchants could save by imposing surcharges on one credit card brand but not another. And second, the cost differential between credit and debit is such that real world data gives us reason to expect that merchants will want to use the surcharging tool to drive traffic from one product to the other. By contrast, there is no sound reason to expect the spreads between card brands would incite surcharging behavior.

2. *Differential Surcharging Is Illegal In Ten States, And No Constitutional Challenge Applies*

As discussed above, ten states have statutes that make the imposition of surcharges on credit cards illegal. Having successfully knocked out the New York statute, *see Expressions, supra,* merchants represented by Class Counsel here have filed challenges to the three largest remaining states' anti-surcharging laws and plan to challenge the rest, based on the First Amendment to the U.S. Constitution. Critically, these constitutional challenges are *simply not available* to merchants who would seek to engage in differential surcharging.

The constitutional challenge is not available in the differential surcharging context because the whole point of the constitutional case is that the illegal activity (imposing a fee for all credit card transactions) is mathematically identical to conduct that is expressly legal (offering a discount for anything but credit). If the merchant advertises a price of $100 and a $2 discount for debit/cash/checks, that is legal. But if he advertises a price of $98, and a $2 surcharge for using a credit card, that is illegal. In either case, the commercial offer is the exact same: a higher price for credit, and a lower price for everything else. What is different is merely how that commercial offer is communicated. Plainly, then, the laws do not regulate *conduct*; they regulate *speech*. And under clearly applicable commercial speech principles, the laws do not survive First Amendment scrutiny. *See Expressions*, 2013 U.S. Dist. LEXIS 143415.

But now change the facts, to address the would-be differential surcharger. What if a merchant-plaintiff wants to impose a surcharge *only* on American Express cards? This merchant's illegal activity (imposing a fee for just Amex transactions) is not mathematically equivalent to legally protected conduct (offering a discount for anything but credit). As applied to *this* merchant, then, the law does not regulate speech: it does not dictate the words he must use to communicate a plainly lawful offer; it bans *conduct*. This merchant thus has no First Amendment argument at all. If our clients in the case before Judge Rakoff had testified that they wanted to engage in this sort of "differential" surcharging, the *Expressions* case would have been dismissed out of hand. What our clients testified was that they wish to impose a single surcharge for the use of all credit cards, which is mathematically identical to a permitted discount for the use of everything but credit cards. *See, e.g.*, Supplemental Declaration of Steve Milles dated 7/29/2013, 13-CV-03775-JSR, DE 42.

The implications here are powerful. While certain merchants may argue that their sole interest lies in seeking rights to engage in differential surcharging, those merchants ignore the fact that the laws of 10 states (including New York, California, Texas, Florida and others that collectively account for nearly half of U.S. transaction volume) prohibit the conduct they seek to engage in, and that these merchants have *no viable argument whatsoever* against those state statutes.

3. *Alternative Sources For Differential Treatment Rights*

Lastly, it would be a mistake to consider the surcharging relief obtained here in a vacuum. Rather, as discussed above, this settlement is taking place on the eve of the Government's trial against American Express. If DOJ wins its trial, it will obtain important differential treatment rights for class members, including the right to offer discounts and other inducements for the use of competing credit card brands. Merchants whose primary focus is on chipping away at their credit card rates through negotiations – but who are disinclined for whatever reason to use the new surcharging tool to recoup acceptance costs or shift volume to debit – may gravitate towards relying on the DOJ-supplied tool of differential discounting.

On the other hand, if DOJ were to lose at trial, then merchants will not have the ability to engage in differential discounting. But then, if DOJ loses, it is hard to see why private plaintiffs would have won. On that scenario, the value of the relief obtained in the instant settlement will be all the more stark.

C. Due Process/Adequacy Of Representation Considerations

In complex injunctive settlements, there are invariably some class members who take the position that they would have preferred additional, better or different injunctive relief terms. Thus in *Robertson v. NBA*, 556 F.2d 682 (2d Cir. 1976), where the relief obtained by Class

Plaintiffs including Oscar Robertson served to revamp NBA draft policies, objectors including Wilt Chamberlain complained that the relief stopped short of achieving true free agency. Likewise, in *Joel A.*, 218 F.3d 132 (2d Cir. 2000), where the settlement agreement broadly overhauled the child welfare system, objectors complained that it failed to achieve special protections for gay foster children. And in *Wal-Mart*, which altered the Visa and MasterCard honor-all-cards rules, objectors complained that the settlement failed to obtain relief on claims they had brought attacking *other* Visa and MasterCard rules, including the so-called exclusionary rule and the default interchange rules. In essence, the objectors in all these cases argued that the class settlement "left significant claims on the table." *Wal-Mart*, 396 F.3d at 109-110.

But what matters, in the Second Circuit, is not whether an objector can conceive of better or different relief. Indeed, it does not even matter whether the Class Plaintiffs *tried* to obtain better or different relief. All that matters, the Second Circuit holds, is whether there was *adequate representation*. The "essential question," according to the Court of Appeals in *Wal-Mart*, "is whether the interests that were served by the settlement were compatible with those [of the absent class members] when the plaintiffs negotiated the release of the [absent class members'] separate claims." *Wal-Mart Stores*, 396 F.3d at 110. "Due process does not require that all class claims be pursued. Instead, . . . adequate representation of a particular claim . . . is determined by the alignment of interests of class members, not proof of vigorous pursuit of that claim." 396 F.3d at 113.

In this case, the interests are perfectly aligned and represented. All Class Plaintiffs and all class members have a shared – and indeed identical – interest in obtaining broad and meaningful rights to surcharge. Class Plaintiffs did not contract to release any claims that they themselves do not possess. On the contrary, they released claims that they *do* possess –

including the claim seeking broader differential surcharge rights – because their informed and conflict-free judgment was that the interests of all class members were best served by the instant settlement.

VIII. Class Notice Was Adequate By Any Measure

Due process requires that notice "fairly apprise the prospective members of the class of the terms of the proposed settlement and the options that are open to them in connection with the proceedings." *Wal-Mart,* 396 F.3d at 114. The standard for determining the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id.* at 113.

Here, the parties implemented a Court-approved notice plan that amply satisfies the requirements of due process and Rule 23. As detailed in the report filed on March 25, 2014 by Epiq Solutions, the Court-appointed administrator charged with executing the notice plan approved by the Court in the preliminary approval order, Epiq Solutions: (1) sent postcards via First Class Mail to each of the millions of Amex-accepting merchants in the United States for whom American Express maintains a postal address, providing basic information on the settlement and directing them to the case website and a toll-free phone number for complete information; (2) published notice in a combination of national and regional business publications as well as retailer trade journals; and (3) established a case website containing a long-form notice and other case documents (www.amexmerchantsettlement.com), and established a toll-free telephone service to provide information regarding the settlement. DE 346.

By any measure, the Court-approved notice plan was "reasonable" when it issued and it has been faithfully executed, as detailed in the report of the Class Administrator.

CONCLUSION

For all the foregoing reasons, Class Plaintiffs respectfully request that the Court grant final approval of of the consolidated class action proceedings in *In re American Express Anti-Steering Rules Antitrust Litig.*, 11-MD-2221 and *Marcus Corp. v. American Express Co.*, 13-CV-07355.

Dated: April 15, 2014

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A4831

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

REDACTED VERSION

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IN RE: AMERICAN EXPRESS ANTI-STEERING RULES ANTITRUST LITIGATION

This Document Relates To:
CONSOLIDATED CLASS ACTION

11-MD-02221 (NGG) (RER)

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THE MARCUS CORPORATION,
on behalf of itself and all similarly situated persons,

Plaintiff,

- against -

AMERICAN EXPRESS COMPANY et al.,

Defendants.

13-CV-07355 (NGG) (RER)

---x

DECLARATION OF ALAN S. FRANKEL, PH.D.

20. When the cost or profitability to the merchant of selling one product (or service) differs significantly from another, it is common for the merchant to set different prices (or other terms of sale) for the two products. It surprises no one if a merchant posts different prices per pound for apples and oranges, or for different varieties of apples.

21. In some cases, a merchant may choose not to differentiate the prices of alternative products despite cost differences between the two.[7] But as the cost difference widens, more merchants will choose to treat buyers of the two products differently by charging different prices, and the extent of any price difference will tend to increase as the cost gap widens. The same is true of services merchants provide to their customers. Merchants may offer free parking, but they are less likely to do so in costly city locations than in lower cost suburban locations, all else equal. Decisions whether to charge for ancillary services, or to set different prices for products that generate different costs to the merchant, are typically left to individual merchants, constrained by competition from other merchants and the necessity for them to cover their costs to remain in operation. So some merchants might offer free delivery, while others charge for delivery, and still others offer free 5-day delivery but charge for faster delivery. The competitive process determines to what extent those strategies succeed.

22. Differential pricing or promotion at retail is a principal mechanism by which competition between merchants' *suppliers* occurs. If a merchant sells products that are substitutes, any one supplier that attempts to increase its price (unrelated to market cost increases) runs the risk that merchants will raise the price for that supplier's products (or

[7] I termed this phenomenon "price coherence" in a 1998 article. Alan S. Frankel, Monopoly and Competition in the Supply and Exchange of Money, 66 Antitrust Law Journal 313 (1998).

reduce promotional effort, etc.) but not the alternative products, inducing some consumers to switch to the lower cost products. In a highly competitive market, the attempted price increase is defeated (or deterred), because so many sales are lost that the price increase proves to be unprofitable to the supplier.

3. The Agreement Will Benefit Merchants

23. In competitive markets, a low price supplier typically has a competitive *advantage* over a high price supplier (all else equal), because merchants will tend to set lower retail prices for lower cost products, i.e., they *steer*, and some consumers will shift their purchases to the lower priced product if they are (at least to some degree) substitutes. A supplier that keeps its prices to merchants lower than suppliers of substitute products thus gains sales volume and can make up more profit from additional sales than it sacrifices by keeping its prices low. Simultaneously, because the high priced supplier loses sales, its ability to profitably maintain or increase its prices is constrained by the existence of the low cost alternatives.

24. Payment card networks like American Express have used anti-steering rules to suppress this basic competitive process with respect to the networks' card acceptance services provided to and paid for by merchants. In this part, I explain the following.

- Credit cards typically cost merchants substantially more to accept than other payment methods, and in particular, debit cards.
- At the difference between the cost to merchants of accepting debit cards and credit cards in the United States, many merchants are likely to adopt credit card surcharges when they are permitted to do so.
- Surcharging permits merchants to recoup the cost of credit cards directly from customers who use credit cards. This allows merchants to set lower posted prices.

A4834

CIVIL CAUSE FOR CONFERENCE: Oral Argument (2/30). 2:00Pm – 3:00Pm

Before JUDGE: GLEESON DATE: 7/18/2014 TIME: 11:30 Am – 1:00Pm

Docket Number: 05MD1720 and 14MD1720

TITLE: In Re Payment Card Interchange Fee and Merchant Discount Antitrust

Courtroom Deputy: Ilene Lee CR: Tony Mancuso.

(Transcript Request Email: Anthony_Mancuso@Nyed.uscourts.gov)

APPEARANCES:

FOR PLAINTIFF: (Please see attached list.)

FOR PLAINTIFF: _____

FOR DEFENDANT: (Please see attached list.)

FOR DEFENDANT: _____

✓ CASE CALLED.

- Oral Arguments heard in both cases regarding:
  - Defendant's motions to dismiss the Opt-Out complaints/claims.
    (The Court has DENIED these motions for the reasons as stated on the record.)
  - Defendant's motions to dismiss the Declaratory Judgment actions.
    (The Court has DENIED these motions for the reasons as stated on the record.)
  - Defendant's motion to dismiss the Salveson complaints.
    (The Court's decision is reserved and will be filed separately via ECF.)
  - Future Opt-In procedures.
    (A proposed notice on these procedures is due by Sept. 23, 2014.)
  - Third party claims filers.
    (Reports on status given – still ongoing.)
  - Franchiser/Franchisee.
    (Submissions are due by Sept. 23, 2014.)

A4835

ATTORNEY APPEARANCES FOR THE IN RE VISA/MASTERCARD CHECK CARD MDL ORAL ARGUMENT IN BOTH 05-MD-1720 AND 14-MD-1720

Date: July 18, 2014

PLAINTIFFS/OBJECTORS:

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DEFENDANTS:

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Kenneth Gallo, Esq.
Gary Carney, Esq.
Keila Ravelo, Esq.
Matthew Freimuth, Esq.
Robert Mason, Esq.
Mark Merley, Esq.
Benjamin R. Nagin, Esq.
Gary J. Malone, Esq.

A4836

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION : 05 MD 01720 14 MD 1720 United States Courthouse Brooklyn, New York : July 18, 2014 11:30 o'clock a.m.

:
- - - - - - - - - - - - - - - - X

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by CAT.

* * * * *

(Case called; both sides ready.)

THE COURT: Good morning. Have a seat, everyone. Welcome back. There's been some back-and-forths on the time. It strikes me I haven't been as helpful as I could be on that. I'll make up for that this morning and this afternoon, because there's some issues on which less argument, in my view, is necessary than other issues. I'll tip you off to that as we go.

What I would like to do between now and when we break for lunch is hear first from the defendants on their motion to dismiss the opt-out claims. I'm hopeful to hear argument on both sides of those motions and the motions to dismiss the declaratory judgment actions before lunch. Might be overly optimistic, but I don't think so.

After lunch, we have the Savelson motion to dismiss. And then the status update with regard to some of the issues in the MDL is, now my order approving the settlement is up in the circuit.

So, who is going to argue on behalf of the defendant's motion to dismiss the opt-out complaints?

MR. VIZAS: Your Honor.

THE COURT: Hello, Mr. Vizas.

MR. VIZAS: I'm going to do part of it. We're going to split it.

Four of the five motions are motions that the Court has had an opportunity to hear about and read about in the past: The Visa check settlement, release argument, Buffalo Broadcasting and the IPO's. The fifth issue is a new one.

THE COURT: The filed-rate opt-out. Just to say it makes me interested in hearing all about it.

MR. VIZAS: Your Honor, I'm going to stand up later and talk for maybe three minutes about that. Mr. Gallo is going to address Illinois Brick and IPO. And on the other issues, we're not going to make an affirmative presentation. We'll respond to anything the Court or the plaintiffs have to say. That will be the initial presentations.

On the motions to dismiss, Mr. Shuster -- excuse me. On the motions regarding the declaratory relief, Mr. Shuster will argue, and Savelson will be Mr. Ladner.

THE COURT: Great.

MR. GALLO: Good morning, your Honor. It's a pleasure to be here.

Your Honor, I am intending to keep my comments on both Illinois Brick and the IPO motion at the outset quite brief, because I know the Court is extremely familiar with the issues, and I want to frankly reserve time to respond to what I hear from the plaintiffs. So, I will make a very brief presentation unless you direct me to do something different.

On Illinois Brick, your Honor, we respectfully submit that the complaint should be dismissed under Illinois Brick. The plaintiffs' claims are that Visa and MasterCard rules have an effect of inflating the interchange. The claimants' claims are based on the fact that the acquirer pays to the issuer, and that the acquirer passes some portion or all of that from the interchange to the merchant.

Under Illinois Brick, it's the direct payor of the overcharge that can recover damages, and in this case, the direct payor of the inflated overcharge is the acquirer. It's not the merchant. It is a pass-through to the merchant. There are three circuit court decisions that have dismissed either these interchange overcharge claims or very, very similar claims.

In this circuit, as I know the Court is aware, there's the Paycom decision, where what was discussed was the

fact that the acquirer had to pay charge-backs to the issuer. That is, when a product was returned or something, there was a charge-back for bad credit, and that the acquirer passed the charge-back through to the merchant, and the merchants filed a claim and said that charge-back fees were inflated. And the Second Circuit dismissed that claim under Illinois Brick, saying the acquirer was the direct payor of the alleged overcharge. It's directly analogous to interchange.

THE COURT: How would you have me respond to the argument that's made by a number of plaintiffs? I know it's in the target plaintiff's brief. We're at the motions to dismiss stage. We have a factual allegation that the merchants actually paid the interchange fees.

MR. GALLO: I would respond to that under Twombly, your Honor. I would respond to that under Twombly.

You cannot avoid a motion to dismiss by simply leaving out of a complaint facts that everyone knows to be true in this courtroom. Everyone knows to be true. Here is my point. This case is about the MasterCard and Visa rules. They claim the rules inflate the interchange fee. They cite the rules repeatedly in their complaint, and they walk right up to the edge of citing the MasterCard rules on interchange and MasterCard rules.

For example, 9.1 they know, we know, the Court knows. It's in published judicial decisions. It says that

the acquirer pays interchange to the issuer, and the plaintiffs simply don't quote that, even though they know it's in the rulings

The MasterCard and Visa rules say the merchant contracts with the acquirer. Some of the complaints make that admission. Everybody in this courtroom knows that the merchant pays the acquirer. It's been in pleadings in these cases for years and years and years.

THE COURT: I don't want to quarrel with you. I don't think it's dispositive, necessarily.

Wherein lies everyone knows this is a true exception?

MR. GALLO: Here is the point. I don't think that you can say that the MasterCard rules regarding interchange, the MasterCard rules which they plead regarding the relationship between acquirers and issuers and merchants, cause interchange to be inflated, and then artfully draft a pleading that leaves out the fact that the acquirer pays interchange to the issuer, and instead simply plead merchants pay it directly to the issuer.

THE COURT: That's a fact. It's not a conclusory assertion of the sort that Iqbal says that I should put aside. That's a fact.

MR. GALLO: It is an allegation, your Honor, that I

would suggest is an absolutely implausible allegation, in light of the fact that there are judicial decisions that recite how the system works and says the opposite, that no lawyer in this courtroom can stand up, consistent with Rule 11 --

THE COURT: I was just about to say to you, I wonder, to the extent you are right -- and they are going to say you are wrong factually -- to the extent you are right, one wonders whether the relief that you seek lies solely in Rule 11, not in this everyone-knows-otherwise slice of doctrine that you want me to adopt.

MR. GALLO: I don't think any lawyer in this courtroom is going stand up in front of you today, any of my adversaries, and say that as a fact, there is actually a payment that goes directly from a merchant to an issuer. I don't actually believe that any lawyer in this courtroom will say that to the Court, because everyone knows it's not true.

I believe what they are doing when they say that is, they are saying the economic reality is that the merchant pays the acquirer and it gets passed through to the issuer. Therefore, we're paying the issuer, even though -- so, in other words, I don't think anybody is going to actually say to you that they pay the issuer directly, because they know it's not true, and I don't think any lawyer in this courtroom will say that. So, I don't think that's going to be a problem. I

think if asked, plaintiffs' counsel will admit that they pay the acquirer and that their argument is simply one about the economic effect.

I don't think that's the problem with the Paycom decision. In the Kendall decision, which in the Ninth Circuit dismissed claims like these, interchange overcharge is an indirect charge.

And the decision in the ATM case out of the Ninth Circuit, which is a consumer decision, because interchange runs the opposite direction in the ATM case and the consumer claimed to be overcharged when a consumer paid a fee when he or she used an ATM machine and had to pay the fee, that was dismissed. All three of those cases are, we submit, dispositive.

Plaintiffs therefore end up relying on two exceptions to Illinois Brick to try to ask you not to dismiss the complaint, two exceptions that have never been recognized in this circuit, and two exceptions that are not recognized by the Supreme Court and exceptions that do exist in the Ninth Circuit, but the Ninth Circuit nevertheless dismissed two cases similar to this under Illinois Brick.

With respect to the IPO claims, your Honor, we respectfully submit that those claims are barred as of the date of the MasterCard, that claims based on a structural conspiracy or a horizontal conspiracy to set interchange fees

or pass the MasterCard or Visa rules fail as of the date of the MasterCard IPO and then the respective date of the Visa IPO. And there's really two prongs to this argument, and of course the Court has already written on this, so I'll be very short on this.

Post-IPO, there is no basis to conclude that an independent MasterCard or Visa with an independent board and independent fiduciary duties running to shareholders of those entities is acting contrary to those duties to promote the interests of banks rather than to promote the best interests of MasterCard, and there's no allegations here that change that result that your Honor reached in the class case. The allegations here are not materially different.

Since you reached that result, Judge Berman-Jackson in Washington, D.C. in federal district court there has agreed and reached the same result in another case brought against MasterCard and Visa.

In the absence of structural conspiracy, the plaintiffs would either have to prove actual horizontal communications and agreements between and among the banks and MasterCard and Visa to set interchange rates or to establish the rules. There are no such allegations.

Or, they would have to come up with some reasoning why your Honor should infer the existence of such a horizontal agreement, and all they can point to is the fact that the

banks have agreed to follow the MasterCard and Visa rules by joining MasterCard and agreeing to follow the rules.

The law is extremely clear, under cases like Kendall and the Toscano case, the American Airlines case, the Ad Sat, that joining and following the rules of an association or of a network is not sufficient to establish a Section One conspiracy.

And lastly, under the Interstate Circuit line of cases and the Toys R Us line of cases, which say a Court may infer a conspiracy if someone acts in a way that would make no sense unilaterally -- that is, if it wouldn't be in the unilateral interest of a bank to join MasterCard and Visa and follow the rules -- in they join, one would say there must be some sort of conspiracy going on, because the unilateral action makes no sense.

Here, it makes perfect sense for any banks to join the network, follow the rules of the network unilaterally. City may join and Chase may not join. City can make a lot of money joining the network and following the rules. You don't need a conspiracy to explain a bank's decision to follow the rules of the network. Therefore, a conspiracy should not be inferred.

Again, I would refer you to Judge Berman-Jackson's decision, District of Colombia. She addressed all the issues that the plaintiffs raised here -- Interstate Circuit, Toys R

Us, American Needle -- found none of them support the finding of an inference of a conspiracy in this setting.

Thank you, your Honor.

THE COURT: Who is up next?

You're going to address Buffalo Broadcasting?

MR. VIZAS: We're not going to address Buffalo Broadcasting now. We're going to wait and see what's done. Filed rate is the other one.

Good morning.

THE COURT: Good morning.

MR. VIZAS: I'll be very brief. As you can see by our papers --

THE COURT: By the way, the motions, all of them, are very well briefed. Thank you all for that.

MR. VIZAS: The Durbin Amendment to the Dodd-Frank Act, which became effective in October 2011, bars any claim based on debit fees charged after that date pursuant to the filed-rate doctrine.

I would like to make two basic points.

First, the case law that we've cited in the brief is Simon and Canadian Import cases makes it clear that the doctrine doesn't technically have to be a filed rate. It's a rate that is set by a federal agency, and not by a third party.

When you look at the facts of this situation, I

think it's pretty clear the rate cap that Congress has set pursuant to the Durbin Amendment is beyond dispute. Congress instructs the Federal Reserve Board to do an analysis -- I think this is the important point -- of what is a reasonable rate for debit interchange.

The Federal Reserve Board in this case followed that mandate pursuant to congressional statute, and in 2011, after a lot of analysis and work, published a rate that they said was reasonable for debit interchange, and set a maximum cap for debit beyond which you cannot charge. The Fed expressly said that the fee cap that they set -- I'm quoting -- is reasonable and proportional to the cost incurred. They set the rate at twenty-one cents plus five basis points, and in the future, they obviously, if they think it's necessary, will reset that rate and it precludes Visa and MasterCard from charging beyond that rate.

That's really it, in a nutshell, our argument. We think it's clear. Obviously, it only applies after October 2011. We're not making any claims before that time.

There's one point that the plaintiffs have raised that we would like to concede, which is that the Durbin Amendment has in it a limitation to cards issued by so-called small banks. A small bank is a bank with assets less than ten billion dollars, and we do agree that it doesn't apply to that, so we wouldn't seek relief.

Thank you, your Honor.

THE COURT: Thank you, Mr. Vizas.

Mr. Shinder. Welcome back.

MR. SHINDER: Thank you, your Honor. Your Honor, I'm going to lay out for you the order that we are prepared to go in. I'm happy to take your guidance, particularly given how the defendants structured their presentation.

I'm going to argue first and I was intending to argue the Visa check-release. Then I was going to turn the mike over to Mr. Wilson from the Target Group, who is prepared to address the filed-rate doctrine, and he was going to argue the 12(b)(6) standard and how they apply, how they compel an independent evaluation of the various complaints here.

Since we have an omnibus motion that's attempting to tar distinct complaints with the same brush -- and parenthetically, your Honor, on behalf of the 7-Eleven plaintiffs, we believe that defendants' argument can be dispensed with -- on that Visa check, since they are facially inappropriate for 12(b)(6), we would like to highlight for the Court our complaint includes distinct allegations on the IPO issue, on Illinois Brick that are set forth in our papers. I'm not about to argue them, but if the Court wants to hear about them later on, I'm happy to address how they feed into and respond to the arguments the defendants are making.

Then Mr. Kaplan was going to take on, on behalf of

the Easymark plaintiffs, Buffalo Broadcasting. And then Mr. Slater, last but not least, will be arguing the IPO and Illinois Brick issue.

If you would like to hear any particular issues, given what the defendants just did, happy to rearrange that order. If not --

THE COURT: That sounds fine.

MR. SHINDER: So, let me address the Visa check-release argument.

Your Honor, this is a very simple issue, and this motion -- this aspect of defendants' motion should be denied for two reasons. First, defendants' position on this motion conflicts quite starkly with the bargain that the parties struck in 2003, which is quite clearly laid out in the Visa Check settlement agreement.

Second, defendants' current position, that release somehow bars post-2003 interchange claims, was squarely rejected by the Second Circuit in 2005. Let me briefly address both points.

First, as your Honor has previously found, the Visa Check settlement release is unambiguous, and the plain text of the settlement shows that any conduct post January 1, 2004, including conduct that was related to the conduct at issue in Visa Check, was not covered by the release. The settlement agreement expressly states that the release is limited to

claims "relating in any way to any conduct prior to January 1, 2004 concerning claims which were asserted in the case or could have been asserted in the litigation."

That this cutoff date for the scope of the release was intended to be a firm temporal boundary was not only reflected in the language I just quoted, but is clear from the relationship, the releases' relationship to the rest of the settlement. It is also clear from the consistent statements of the proponents of the Visa Check settlement as to this Court and to the Second Circuit, that the release did not cover post-2003 conduct, including conduct related to the conduct at issue in the Visa Check case.

While your Honor is intimately familiar with the details of that settlement, forgive me for rehashing them, just to put some of these arguments in context, Visa Check settlement created a $3 billion, approximately $3 billion settlement fund, which was designed to compensate members of the Visa Check class for damages related to the honor-all-cards tie-in rules, the 1992, the beginning of the damage period to the summer of 2003.

Because Visa and MasterCard could not rescind their honor-all-cards time rules to the end of 2003 due to certain logistical issues, the settlement called for an interim reduction in significant debit interchange rates between August 1, 2003 and the end of 2003.

On January 1, 2004 the, honor-all-cards time rules were rescinded per the agreement, and the settlement expressly said that Visa and MasterCard were free to set whatever interchange fees they liked, subject only to, quote unquote, "applicable law and the dictates of the marketplace," and as of that date, any member of the Visa Check class was free to sue Visa and MasterCard for any conduct, including conduct related to the conduct at issue in Visa Check, provided it occurred on or after January 1, 2004. That was the deal, and today defendants are trying do rewrite it.

In stark contrast to defendants' current position, Mr. Gallo, speaking for the defendants in 2006, had it right on their first motion on this issue in MDL 1720, which I'll note was properly addressed to pre-2004 damages, when he said "We get the release out to January 2004, and we paid three billion for that release."

In other words, the honor-all-cards time rules, the central issue in the Visa Check case, were in effect. He also got it right --

THE COURT: I hate to interrupt you. I actually think you are right on this, so you don't need to argue it that much longer.

We have to be setting some kind of record for the series of cases, for the number of times the lawyers in the cases are quoted with something they said in prior iterations

of the case is quoted right back at them. I know it happened to you a number of times, so it must feel good to do that.

MR. SHINDER: All right. I'll stop.

THE COURT: If I have questions, I'll pose them to you. I actually think you have the better of this argument, so if you don't mind me cutting you off a little bit.

MR. SHINDER: I will turn it over this to Mr. Wilson. Thank you, your Honor.

THE COURT: Thank you, Mr. Shinder.

MR. WILSON: Your Honor, I'm Jim Wilson, and I'm new, so I can't be quoted back in this case, but it's a pleasure to appear before you.

Your Honor, I'm going to address first of all the standard on the motion to dismiss, which your Honor has already raised in his questions of opposing counsel. Then I'm very briefly going to address the filed-rate doctrine.

Your Honor, I'm sure, is aware of the giant donut hole in the defendant's brief in this case is, they never bothered to address the standard on a motion to dismiss. And this Court, I am sure, is also aware that the Anderson News standard, which doesn't you allow the Court to choose between competing plausible inferences, is the standard that applies here.

What the defendants have done is try to avoid Anderson News, I think on two bases. One, in the reply memo,

any allegation they don't care for, they simply assert are conclusory, and they try to hitch their wagon on some form of judicial notice that is well beyond what either the Federal Rules of Evidence would allow or certainly the motion to dismiss standard would allow.

With respect to -- for example, the issue of indirect purchaser -- and Mr. Slater is going to address the specifics of that -- but what we have is a motion to dismiss that essentially lumps numerous complaints allegation together, doesn't address anyone's specific allegations, and then argues that all of those allegations are conclusory.

We disagree.

For instance, the Target complaint has seventeen different paragraphs alleging that we are the ones that pay interchange. I know that Mr. Gallo said that we can't possibly allege that. We believe we can.

We don't believe that the facts will ultimately show that the representations made, for instance in the Kendall case, will prove to be true. We don't believe, for instance, throughout the whole history of this, that what Mr. Gallo has represented to be true will be what the proof shows. The bottom line is, we're not here today to decide between competing plausible inferences. Rather, our allegations have to be accepted as true.

Your Honor himself, in the Precision Associates v.

Pinalpina World Transport case, was dealing with allegations of surcharges in that case, and found allegations that candidly I would say were far less specific than what we have made here, were sufficient to survive the motion to dismiss standard. We think that same reasoning applies here, and would apply to the allegations made by the other defendants in their complaints.

I'll then just briefly, your Honor, unless you have any questions about the standard, move on to filed rate. I'm going to be brief, because I think it's clear that this issue affects only the smallest sliver of this case. It only affects debit cards, and as counsel has conceded, they are probably only half of the volume of debit cards since the time of the Durbin Amendment.

Our position, as set forth in our briefs, is very simple. First of all, contrary to what counsel said, we don't believe this falls within the parameters of what is in fact a filed rate, because counsel misspoke in saying that Visa and MasterCard were constrained in what interchange rate could be charged.

In fact, I believe it's the banks that are constrained in what they can charge under Durbin. Each of those banks, in a competitive world, is free to charge less than the Federal Reserve's ceiling on the rate of interchange, and that, in fact, is further emphasized in the legislation

which requires that the cards carry two different networks to enhance competition in that aspect of interchange.

The reality is, filed-rate doctrine is ultimately an issue of statutory interpretation. Did Congress intend to adopt a filing statute, or did it intend something else? We would assert, as we have said in our briefs, Your Honor, that there is no way that the filed-rate doctrine can be applied to a statute that is specifically intended to enhance competition in that aspect of interchange.

THE COURT: Thank you, Mr. Wilson.

Who is next?

Mr. Kaplan.

MR. KAPLAN: Good afternoon. Nice to see you.

THE COURT: Nice to see you.

MR. KAPLAN: Buffalo Broadcasting. I'll be very brief. That was a case that was decided after a full trial before Judge Gagliardi. It had a history to it where there had been prior decisions. CBS decision. It was being run by, at that time, Judge Connor. I might say, Sylvester Ryan, used to be the ASCAP judge.

The Second Circuit found that there were, realistically, alternatives to the blanket license. They determined the decision in the legal and factual context in which it currently exists.

Here, the complaints allege that there are no

realistic alternatives because of the rules that exist. And I also say that one of the realistic alternatives that the Court found, the Second Circuit found, was that they could license directly with the copyright holders. Here. That can't be done. You have to deal with all of the issuing banks. You can't try to do a deal with one bank and say. I won't use your card unless you deal with me. It would be like in Buffalo Broadcasting, if they had said, If you want Cole Porter, you have to take Gershwin and you have to take other people. Here, the complaints allege there are no realistic available alternatives. That's what the complaints allege. And the complaints also allege that you have to look at all of the rules in context. You can't just focus on one of them.

So, unless your Honor has questions, we don't think Buffalo Broadcasting is applicable.

THE COURT: Thank you, Mr. Kaplan.

MR. SLATER: Good morning, your Honor.

THE COURT: Good morning.

MR. SLATER: Your Honor, I'm going to address the two issues that Mr. Gallo addressed, the Illinois Brick and the post-IPO conspiracy. I would like to take Illinois Brick first.

THE COURT: That a factual allegation?

MR. SLATER: It is. It's specifically alleging that we direct pay the interchange fee to the issuing bank. It's

not conclusory. In fact, it specifically alleged that the money which is taken by the issuing bank comes directly out of the money that is owed to the merchant. In other words, they take it right from the merchant's money that is a direct payment of the interchange fee of the merchant from its money. After that, it's just a fact dispute between us and the defendants.

Secondly, assuming that Mr. Gallo is correct, and assuming that the interchange fee is made by the acquiring bank to the issuing bank. That wouldn't help them at all, and the reason is simple. It's because of the co-conspirator rule. A plaintiff who directly pays a coconspirator, and the acquiring banks are specifically alleged to be coconspirators, is not barred by the indirect purchaser rule of Illinois Brick.

Now, the defendants in their brief have claimed that the coconspirator rule is an exception to Illinois Brick. That's not true. Illinois Brick simply doesn't apply when the plaintiff directly pays the money to the alleged coconspirator. That's the specific holding of Judge Easterbrooke in the Seventh Circuit in the Paper Systems v. Nippon decision.

And I'll read very briefly from Judge Easterbrooke's opinion. He says "Illinois Brick allocates, to the first nonco-conspirator in the distribution chain, the right to

collect 100 percent of the damages." The first noncoconspirator is, of course, the merchants. He then says "The first buyer from a coconspirator is the right party to sue." Well, we're the first purchaser from -- we are the first noncoconspirator purchaser. We're the right party to sue. Judge Spencer, also of the Seventh Circuit, said the same in In Re Brand-named Rug. The Eleventh Circuit said the same thing in Lowell v. American Cyanamid.

The Second Circuit has not specifically addressed the topic. There are two circuits, the Fourth and the Ninth, on which defendant heavily relied. It's the Dixon decision out of the Fourth. The In Re ATM decision out of the Ninth cited which was by the defendants. Those two circuits have a rule which limits the coconspirator rule, and says that it applies only where the plaintiff pays the price-fixed rate.

First of all, that limitation has been explicitly rejected by district courts in this Sixth Circuit, which I'll get to in a minute.

And secondly, assuming that that limitation is correct, it again would not help the defendants at all. I'll explain that in a second, as well.

First, the district court decisions in this circuit, Judge Schendlin in Lawman v. The NHL, Southern District of ever of New York, about eighteen months ago, specifically addressed this question of the limitation on the coconspirator

rule, and explicitly said that In Re ATM is wrong, and that Judge Easterbrooke was correct, and decided that the first purchaser who was not part of the conspiracy has standing to bring the treble-damage action.

Your Honor, any other rule would leave the wrongdoers free of any suit by any injured victim. They would skate, because of the Illinois Brick rule, the way they interpret it. No court has ever said that.

Now, as I said before, even if the Fourth Circuit and the Ninth Circuit are exempt and this limitation exists, precisely what Judge Schendlin said was untrue. Even if the limitation exists, it wouldn't help the defendants in this case one whit.

Plaintiffs easily meet the test. Now, the plaintiffs have specifically alleged that the defendants and their coconspirators agreed to and did impose the price-fixed interchange rate on the merchants. The defendants do not accept that fact was true, as they are obligated to do. Instead, they impermissibly make up a new fact. It's not alleged on the face of any complaint before them.

The new fact that they make up is the claim that what the merchant pays is one discount rate, and that that discount rate incorporates and includes within it the interchange rate and also the fees that the merchant pays the acquiring bank for acquiring services.

That fact is not only made up, it's false, and the defendants know it's false. Your Honor held specifically, in approving of the class settlement in this case, that the interchange rate is separately identified and broken out, incorporated into the contracts of the merchants, and is a separate identified price-fixed rate. We claim it's price fixed. Your Honor didn't find that. The specific rate is broken out separately and separately paid and agreed to be paid by the merchant in the agreement.

Now, your Honor said -- this is at page 23 of the slip opinion, the issuing bank's interchange fees are identifiable and separate from the total package of fees, including other network fees and acquirer banks' merchant discount fees.

Your Honor was correct. And the contentions, the facts they make up, which is that that finding is incorrect, is not on the face of the complaint. Really, it shouldn't be argued on a motion to dismiss at all.

Before I leave the Illinois Brick issue, I would like to mention Paycom, which Mr. Gallo addressed. Your Honor, in Paycom, Judge Winter in the Second Circuit specifically found that the acquiring bank was not a coconspirator, and that there was no rule in MasterCard to the effect that the acquiring bank had to put the charge-back back to the issuing bank, and as a result of that, there was no

occasion to address the coconspirator rule whatsoever in Paycom.

Let me move to the post-IPO conspiracy. The defendants contend that as a matter of law, the conspiracy must have ended when the banks sold their stock in MasterCard and Visa. Your Honor, that is demonstrably wrong for at least four reasons, and I'll address three of them and stand on our briefs with regard to the fourth.

First, it's specifically alleged, and this time in the 7-Eleven complaint, that at the time the IPO's were undertaken, that there was an agreement specifically amongst the banks and MasterCard and Visa to the effect that the anticompetitive rules, the rule we say are anticompetitive, would be reincorporated and reiterated by the new entity, and that that actually took place. So, there's a specific factual allegation that at the time of the IPO, they specifically agreed to continue the unlawful rules. It's even stated in an SEC filing by Visa that they would reincorporate and continue the same rules.

Secondly, it's specifically alleged in the complaints that post-IPO, each of the associations, MasterCard and Visa, entered into signed written agreements with each member bank, and that those signed agreements -- in those signed agreements, the member banks agreed to impose on the merchants the anticompetitive rules and adhere to those rules

and enforce those rules against the merchants. Every single one of the banks signed a document agreeing to do that.

Section One of the Sherman Act prohibits every contract, combination or conspiracy. These are contracts. The notion that a signed written agreement does not constitute a common plan I think is close to silly. It's a signed written agreement to adhere to the same common plan, and they all did adhere to it.

The Toscano case, which counsel mentioned, in that case, the Court explicitly found that the supposed coconspirator didn't endorse anything, had no part in drawing up the rules, and really, it was just the impetus of his contracting party. He had nothing to do with it.

That's not the case here. Here, the enforcement of the rules against the merchant is done by the acquiring banks pursuant to signed written documents and agreements. Your Honor, that's thousands of signed written agreements, thousands, and is exactly the kind of series of unlawful vertical agreements which, if it has an anticompetitive effect, the Supreme Court addressed in Leegin and said the courts must be weary of a series of anticompetitive contracts or agreement that have an overall market anticompetitive effect.

Third, according to the defendants, they necessarily withdrew from the conspiracy pre-IPO, the existence of which

they do not deny, when they sold their stock. Remarkably, they make that argument without ever addressing the elements of withdrawal from a conspiracy. The elements are well-known and simple.

First, the defendant must take affirmative steps to disavow and defeat the anticompetitive purpose. It's specifically alleged that they took no affirmative steps to disavow or defeat the purpose, and they don't contend otherwise.

Secondly, the defendant must not continue to receive benefits of the anticompetitive scheme here. It's alleged that they received the supercompetitive interchange fees and prevented the competition between the different associations, which was the purpose of the scheme to begin with. They continue to receive those benefits.

Thirdly, the defendant must take no additional acts in furtherance of the scheme. Here, they took many acts in furtherance of the scheme, all specifically alleged. All the banks signed the agreements to continue the illegal rules, and all of the banks are alleged to have continued to enforce those rules against the merchant post-IPO. Again, affirmative acts in furtherance can't be withdrawal.

The defendants literally have no response to any of this. Instead, they say, We sold -- the banks sold their stock, conspiracy must be over. Cite no cases in support of

that.

The case law is directly to the contrary. U.S. v. Sax, Morton's Market, which we have both cited to your Honor, both say that the sale of stock does not withdraw the entity whose stock is sold from the conspiracy.

Your Honor, change in ownership, in stock ownership, that doesn't affect the rules, didn't affect their conduct, didn't affect their agreements to continue the same conduct, is not a withdrawal from an antitrust conspiracy.

Your Honor, the fourth argument that we have is one where we'll stand on the briefs. The plaintiffs have specifically alleged that there is a tacit agreement amongst all of the bank members to continue to impose these rules on the merchants, and that it's contrary to the individual self-interest of every one of those banks to enter into an agreement which says the merchant cannot give a discount to my card and the merchant cannot impose a surcharge on my competitor's cards. Every bank is hurting itself, unless he knows that all the other banks will reciprocate and all of them will agree that they can't surcharge his card to move it to their card, and can't give a discount to his card, again to move it away from the other bank's card.

Your Honor, unless you have questions, that's all I have.

THE COURT: I don't, at the moment. If that

changes, I'll let you know.

Thank you.

All right.

Any brief rebuttal?

MR. GALLO: Yes, your Honor.

THE COURT: Mr. Gallo.

MR. GALLO: Your Honor, on Illinois Brick, the question is, is there a plausible allegation that the merchant is the first payor of this inflated interchange rate? And notwithstanding what you just heard, there's no allegation that the first payor of the interchange rate is the merchant. That is, the acquirer. It's admitted that the acquirer pays it.

The point that Mr. Slater is making is that it shows up in the -- goes from the acquirer's bank account, there's a debit against the merchant's bank account, but there's no assertion that the acquirer isn't paying the interchange first. And because of that, you have to pass-through the problem that Illinois Brick is directed at the coconspirator exception. It's not been recognized in the circuit. It's not been recognized in the Supreme Court.

The cases where it has been applied are cases where the actual alleged fee that was the result of the conspiracy was charged to the plaintiff. In this case, that's the merchant discount fee. It may or may not incorporate all or

part of the interchange fee, but it's a different fee. The interchange fee is allegedly passed through as part of that fee.

Now, why is that so important? Because in Judge Easterbrooke's case, in the pharmaceutical case that was referred to in Judge Posner's case in the Eleventh Circuit case, all of those cases are cases where there's multiple conspirators, some downstream, who are alleged to have fixed the actual price that the plaintiff paid; not fixed a component of the price the plaintiff paid, the actual price. And because that's true, because they are fixing the actual fee that the plaintiff paid, you avoid all the problems of pass-through that Illinois Brick is worried about.

When instead, you have this situation where interchange is just a component, then you walk right into the Illinois Brick problem of trying to allocate how much of it was actually passed through.

Judge Schendlin did disagree with that ruling. That's true. I think Judge Schendlin respectfully is wrong about that, and secondly, her case actually was not a pass-through case, so the issue didn't get crystalized. Her case was simply an allegation that the sports leagues, the regional networks that have rights to broadcast the sports leagues and the actual cable and satellite providers to consumers conspired in such a way that it had the effect of

inflating the price the consumer paid to the cable provider. There was not a pass-through problem like Illinois Brick. So, I don't think that's a case that is particularly helpful in thinking about the issue.

The Paycom case, the rules applicable in Paycom about not passing through charge-back, are equally true with respect to interchange. There's no rule that requires interchange to be passed through. Sometimes it is, sometimes it's not, depending on the negotiations between a merchant and an acquirer.

Acquirers don't have to pass through interchange, and a big, powerful merchant may be able to get a deal that's very different than a less-powerful merchant in terms of what percentages of anything is passed through.

With respect to the IPO, all of the arguments you just heard, which were very forcefully and eloquently made, were arguments you also heard when we had this argument with respect to the class action.

And the fundamental point, that I say respectfully and hope that I am correct, that the plaintiffs are missing in your opinion is that these arguments don't address the question of how can one infer that an independent board of directors, with independent fiduciary duties, free from any legal obligation or right to look at the interests of the banks, as opposed to MasterCard continue rules in place that

would benefit the banks and not benefit MasterCard and Visa, and the shareholders of MasterCard and Visa. And there's no answer to that.

The fact that pre-IPO the rules were in place, and post-IPO the board adopted the same rules, it does not lead to an inference that the independent directors are violating their fiduciary duties or doing something to promote the interest of the banks rather than the interest of MasterCard and Visa, and that runs through all of the arguments that you heard.

Thank you, your Honor.

THE COURT: Thank you, Mr. Gallo.

MR. VIZAS: If I may say a few words about Buffalo Broadcasting?

THE COURT: Yes.

MR. VIZAS: With respect to the Buffalo Broadcasting argument, obviously this motion is targeted specifically at the default interchange rule, not at the basket of rulings.

There is no dispute, and listening to plaintiffs' arguments, I think there's no dispute at all that the default interchange rule on its face allows issuing banks and merchants to negotiate for different interchange rights. No one is required to accept an interchange rate if they have other options in the face of the rules.

The second option that clearly merchants have, and again, there's nothing alleged to rebut either of these, is that the rules leave the banks, who are issuers of Visa cards, free in their independent capacity to provide alternative network services to merchants, to negotiate with merchants irrespective and outside the Visa system. That's why we think that this motion, when you distill it to its heart, is persuasive and in fact correct.

To respond briefly to two points made by counsel. There was the suggestion about Buffalo Broadcasting that somehow the holding turned on the fact that there had been discovery and a trial, and it wouldn't be appropriate to apply at the motion-to-dismiss stage. Nothing in Buffalo Broadcasting or the other cases cited suggests that Buffalo Broadcasting's principles can't be applied at any stage.

In fact, Buffalo Broadcasting was cited in the Second Circuit by applying principles of law. It did not refer to fact.

Secondly, the Paycom decision, which almost everyone has talked about today and I would be derelict not to, the Paycom decision that we cite in our brief, and I won't repeat the brief, but the Paycom decision was at a pleading stage. I would like to quote briefly. Just as in this case, in Paycom the Court found that nothing that sufficiently alleges that the network rules or an agreement among acquiring banks have

prevented plaintiffs from negotiating with the banks to create an individualized solution.

That's all I really have to say. I think it's that clear.

THE COURT: Thank you, Mr. Vizas.

Why don't I hear from the moving defendants in the declaratory judgment actions.

Good afternoon.

THE COURT: Good afternoon.

MR. MALONE: Gary Malone. Representing the declaratory judgment defendants in the case of Visa v. National Association of Convenience Stores.

Your Honor, the declaratory judgment defendants in this action are moving to dismiss or for a stay of the declaratory judgment complaint, because the essential truth here is that the declaratory judgment plaintiffs, Visa and MasterCard and the banks, are not really concerned about a potential damages action for past conduct by these four trade associations and three merchants.

What's really going on here, and what they have essentially admitted to is that they are seeking a procedural advantage here. They hope to get an early summary judgment here, your Honor, that they can then use against the parties that are actually asserting claims here against the actual opt-out plaintiffs in the many dozens of actions brought by

hundreds of opt-out plaintiffs. They are not concerned about the minor damages that they could be liable to these four trade associates associations and three merchants, your Honor.

Because of that, this Court should either dismiss or stay the declaratory judgment for several reasons that all go to the central truth that there's no existing controversy here.

THE COURT: How can there not be a controversy? They are in the case.

MR. MALONE: They are in the case because they are seeking a structural relief, and they want injunctive relief.

THE COURT: Is there no prospect down the road of the damages action?

MR. MALONE: The only prospect of damages action depends upon what happens in the Second Circuit.

THE COURT: Some of the case law under the Declaratory Judgment Act makes it pretty clear if there is a controversy, they don't need to wait around until the plaintiff seeks coercive relief.

And I hear what you are saying, that they have this ulterior motive that gives them a tactical advantage. So, what if it's an appropriate deployment of the Declaratory Judgment Act?

MR. MALONE: Your Honor put your finger on it. If it's an appropriate act.

THE COURT: They know that you are not going to come and seek damages at the far end of the circuit's decision. I thought this statute, one of its purposes, is to allow them to seek a declaration now, rather than wait years to put this dispute behind them.

MR. MALONE: Your Honor, that's proper if there is indeed an immediate controversy. That's what the Supreme Court said in the Med Immune case, which both sides have cited. The question is, is there a controversy of sufficient immediacy?

In all the cases that the declaratory judgment plaintiffs have cited, in which declaratory judgment action was permitted for past conduct, there actually was an immediate threat of litigation. For example, in the Kidder Peabody cases, which they have cited, not only was there an immediate threat where the declaratory judgment defendants said that they would sue for Federal Securities Act violations, they actually brought a state court case on those very same transactions. They were actually suing them at the time the declaratory judgment action was brought.

Here, we don't have that, your Honor. These declaratory judgment defendants have stated unequivocally they are not going to even consider suing until after the Second Circuit has ruled, and because of that, there's no immediacy of -- immediate controversy.

THE COURT: In broad strokes, what are the temporal boundaries of an immediate threat to sue?

MR. MALONE: The cases, your Honor, don't really give --

THE COURT: Yes.

MR. MALONE: What we can glean in the case where there is an immediate threat, it's usually something within a matter of days or weeks where there actually was a letter saying, We might bring a suit. We don't have that here, your Honor.

THE COURT: If it's too quick, then it might be inappropriate use; right?

MR. MALONE: Right.

THE COURT: So, there's like a middle ground where it's a safe deployment of the statute. Too quick, it's an abuse. If it's not immediate enough, where is the sweet spot?

MR. MALONE: I guess I could quote Potter Stewart and say, You know it when you see it. I guess this is a case you know it doesn't occur here because of what you see. What you see is the declaratory judgment defendants saying, We're definitely not going to sue before the decision in the Court of Appeals. So, there really is no immediate threat here.

THE COURT: What's going on there? What's the schedule up there?

MR. MALONE: We're waiting now for the opposition

briefs.

THE COURT: Have the blue briefs been filed?

MR. MALONE: Yes. The initial briefs have been filed by the appellate. We're waiting for the appellees, and then there will be reply briefs.

THE COURT: Is there a period of time in which there might be oral argument? Do they do that?

MR. MALONE: To be honest, I'm not sure. In my experience, it's typical there might be oral argument in the ballpark of six months or so after. I really have no idea.

THE COURT: When are the red briefs due?

MR. MALONE: Right now, October 14.

THE COURT: Have fun up there.

MR. MALONE: We plan to, your Honor. But, your Honor, that really shows that there is no immediate threat here. That determines the jurisdiction of this court, because if there is no immediate controversy, there's no jurisdiction.

But going beyond that, your Honor, even if the Court has jurisdiction, both sides admit this Court has the discretion to decide not to hear this case. And the Second Circuit in the Doherty case noted that the fundamental purpose of the declaratory judgment action is to avoid the accrual of avoidable damages, and that --

THE COURT: It's not limited to that?

MR. MALONE: It's not limited. That's the

fundamental purpose.

Your Honor, all the cases that permit the declaratory judgment action to go forward when there's an issue of past damages also have another component. There's also the question of the ongoing legal relationship of the parties. I can give some examples.

The other side cites the Kidder Peabody case in the Second Circuit. However, in that case, your Honor, the declaratory judgment that was being sought dealt with whether or not there can be a retroactive adjustment of stock rights. So, the parties ongoing legal relationship actually was affected. Plus, in Kidder Peabody, there was actually a state court action, so the declaratory judgment plaintiffs had the prospect that rights might be prejudiced, because there could be piecemeal litigation.

We simply don't have that here, your Honor. All we have here is a case that is solely limited to damages for past conduct. And as the cases recite, pages twelve to thirteen of our opposing briefs show that this is not an appropriate use of the declaratory judgment action and they dismiss those actions regularly, your Honor.

Your Honor, all the cases that both sides have cited, in which a declaratory judgment has been permitted when there was an issue of past damages for past conduct, also had an issue of what the ongoing legal relationship was with the

parties. So, there's something immediate being decided.

Here, we don't have that, because of the settlement in 1720. Because of the b(2) release, there's no question here to the ongoing legal relationship of the parties. That has been settled.

Finally, your Honor, even if your Honor does not dismiss this case, we highly urge this Court to stay the case until the Second Circuit makes its decision. There's simply no prejudice here that the declaratory judgment plaintiffs would suffer. All they say is, Well, we would still have the uncertainty of whether we might have to pay damages in the future. Your Honor, uncertainty about the outcome of a case is what you get every time there's a stay. The question is, is there any real prejudice to either side? And here, there is no prejudice.

If the Second Circuit decides this case by reversing your Honor, then this becomes moot. Then 1720 gets resurrected. If the Second Circuit affirms totally, at that point then the declaratory judgment defendants will decide, okay, do they want to sue or not? But until that point, there's simply no prejudice here to the declaratory judgment plaintiffs which would really make sense. It makes no sense to waste the time of the parties on a case that just might not occur.

I'll reserve any remaining time for rebuttal. Thank

you.

THE COURT: Thank you.

MR. BENNETT: My name is Jim Bennett. I'm the lawyer for Walmart.

THE COURT: Good afternoon.

MR. BENNETT: Good afternoon. We have filed an opt-out case shortly after we filed the motion to dismiss the declaratory judgment action. I believe that our motion should still be granted on the grounds that the Court, I believe, understands, which is that the declaratory judgment action as to us seeks only a declaration of nonliability for past conduct.

Our complaint, our opt-out complaint in paragraph one, defines the damages period aspiring in November of 2012. And in addition, Visa's motion says the damages period ends at that point in time. We cite Johnny vs. Metallica case, a National Union case which says in essence that the declaratory judgment act goes prospectively. There has to be something more than just past acts and past damages at issue in it.

And in this case, we don't have any of that. And in fact, we filed our -- we filed our opt-out case which then, of course, gives the defendants the opportunity to get the adjudication that they want.

So, everything that I think they would try to prove, in our own case could be proved either defending our case, or

I suppose they could file a counterclaim for declaratory judgment, which they have not done in any of the other cases yet.

So, we have a situation where we're wanting damages for a finite period based on past acts.

THE COURT: You place a lot of weight on that. It's not in accord with my understanding of the scope of the Declaratory Judgment Act.

There's cases in which declarations are sought that are purely retrospective, deal with damages. Sometimes it's in insurance settings. It doesn't have to be solely a concern about engaging in future conduct that might produce liability. I understand that might be the more common setting in which a declaratory judgment is sought. I don't understand it to be limited in the manner that you describe or argue.

MR. BENNETT: I believe -- we are, first off, not contesting your jurisdiction over the case. We're in the Prudential section. There are a series of Second Circuit cases that say the purpose, not a, the purpose of a declaratory remedy is to avoid accrual of avoidable damages to one not certain of his rights. We cite the Lukenbach cases and the Doherty cases from the Second Circuit on that. And it is the case that you would have jurisdiction, because there's a controversy based on past conduct.

But if you look at the cases that Visa cites in

response to us, it's not like Salomon Brothers, which is a case where Salomon Brothers had a pattern contract that was still being used on a go-forward basis. The judge said, in that case, At least it's going to declare the rights on a go-forward basis for them.

Another case is an insurance case where the party was trying to figure out if it would have coverage while a reconstruction of the World Trade Center was going forward. They are adjudicating some future rights. We think that's the case.

Here, unlike some of the cases, we filed our case, too, so there's no purpose to be served in getting it adjudicated. We're here, we're before you, certainly until you decide to remand the case to the Western District of Arkansas.

THE COURT: It's clear that -- it's not that it's not a lot. All that's at stake here, if the case goes to trial, it goes to trial in the Western District of Arkansas and not here.

MR. BENNETT: I think that's correct.

THE COURT: That may be your strongest argument.

MR. BENNETT: There's no question that we're here and we're before you for discovery and all of those things. So, here, we filed the case just twelve days after we filed our opt-out. I believe there's simply absolutely no dispute

that Visa said they expect to be in litigation with us, and they said that at a prehearing conference with Judge Orenstein. They understood from the moment we opted out, we are going to be in a case. We think -- we're the plaintiff -- antitrust cases vary analogous to a tort case. We think we get to pick the forum for the trial. We're happy to be here in the meantime.

THE COURT: You don't have to be happy to be here. You're allowed to move even if you are not.

MR. BENNETT: Thank you, your Honor.

THE COURT: Thank you.

Any opposition to this position?

MR. SHUSTER. There is opposition. I want to keep it brief. I certainly don't want to snatch defeat from the jaws of victory.

I do want to address a couple of issues, if I might.

One is, the lawsuit against the former named plaintiffs is against four trade associations and three retailers. They do make an argument that's addressed to the Court's subject matter jurisdiction when they argue that there's no case or controversy.

And all I want to say on that is that there are -- the Second Circuit has rejected the proposition that a representation from a declaratory judgment defendant that it doesn't intend to brought a lawsuit is a sufficient basis to

moot a controversy. So, in the Kidder Peabody case -- here, the declaratory judgment defendants are saying they won't bring a case for a period of time or unless something happens. In Kidder Peabody, the declaratory judgment action in the Southern District of New York was whether the declaratory judgment plaintiff had violated the securities laws, and the Court said -- and the defendant said, We will never bring those claims in our Texas state court action. We'll never do it. And the Second Circuit said, A representation like that is not enough to moot the controversy.

In a Southern District case in 2007, a similar issue. The declaratory judgment defendant submitted a declaration in the case that it would never bring federal securities law claims, and Judge Stein said, That's inadequate. They could change their mind. They can do whatever they please.

Here, they are not even saying they won't sue. They are just saying they won't sue for a period of time. They're saying they only seek structural relief, and will only sue if the Second Circuit affirms your decision on settlement.

But if the Second Circuit affirms your decision on settlement, the one thing that won't be available is structural relief. The only thing that will be available is damages. Three of these defendants are merchants with substantial damages claims. They are going to bring those

claims one way or another, whether the Second Circuit affirms, whether the Second Circuit reverses.

Of course, as your Honor said, we have the reality that these are former named plaintiffs on one of the class claims in MDL 1720. We have been litigating with them for nine years. We're not seeking an unfair tactical advantage. We're seeking finality. We would like to be done litigating with these parties.

On past conduct, you know, I don't have much to add. There are several cases, as your Honor points out, that adjudicate past conduct in the context of declaratory judgment actions. They are in our brief. A couple of those cases cite to a passage in Wright and Miller, which says it's easier to decide declaratory judgment cases when the conduct is past, because then, you don't have to sorry about an advisory opinion, a hypothetical set of facts or anything else. That passage was cited to in one of the cases that Walmart cited, which is the In Re Combustion case, Second Circuit case. They also -- the Second Circuit also cites the Salomon Brothers v. Carey, which is a 1983 decision of Judge Motley, in which she also cited to Wright and Miller. She decided past conduct issues.

Just a couple of arguments that the defendants have that I would like to address. Walmart says that we're engaging in forum shopping. The reason any of this is in this

court to begin with is because Walmart commenced an action in the Eastern District of New York against these defendants in 1996.

Judge Nickerson had a case, 2002, it was a RICO -- a series of RICO class actions had been filed in the Eastern District of New York. Those actions had been dismissed for lack of RICO injury and failure to make out other elements of a RICO claim. The class plaintiffs in those actions then filed a new action in the Southern District of California. They got past a motion to dismiss there. They then threatened the original class defendants with further actions if there wasn't a global settlement. The original defendants filed a declaratory judgment action at plaintiffs in the Eastern District of New York, and the now declaratory judgment defendants complained that it was forum shopping.

And here is what Judge Nickerson said: The circumstances do not warrant any discretionary declination, transfer or stay order. The card purchasers' lament that they are the victims of the forum shopping can hardly be serious. They initially chose this district to litigate their claims, and have not been denied their choice of forum.

The one other argument that I wanted -- two other. One is, the former named plaintiffs say that we filed this declaratory judgment action against them to chill opt-outs. I just don't want to leave that unanswered.

THE COURT: You don't have to address that.

MR. SHUSTER: With that, the only last point I'll make is on the issue of a stay. It simply makes no sense. The opt-out litigation is happening now. It makes no sense to stay the litigation as to one narrow little circumscribed group of opt-out plaintiffs.

THE COURT: Tell me what the prejudice would be to the declaratory judgment plaintiffs if there's a stay.

MR. SHUSTER: If there's a stay, what they are saying, their counsel, Mr. Shinder is representing the 7-Eleven plaintiffs, anyway. He'll participate in discovery. They won't be prejudiced by a stay. I think what they are saying, they'll get the benefits of discovery, but they won't make any discovery in the case.

If there are going to be opt-out plaintiffs, they might was well participate in discovery together with other opt-out plaintiffs. We have defenses. We have defenses we would like to develop in discovery as to all the of opt-out plaintiffs. So, the prejudice is simply setting it aside, and with them of all people, we have been litigating with them for nine years, at some point, we think we're entitled to finality.

THE COURT: Okay.

MR. MALONE: Your Honor, a minute for rebuttal.

THE COURT: Of course. You can have more than a

minute. Not too much more.

MR. MALONE: Just a couple of points, your Honor. With respect to the Kidder Peabody case that counsel just mentioned, in that case, there was actually a state court proceeding on the very transaction that was in issue in the declaratory judgment case. So, there's a real danger of piecemeal litigation, where there could be inconsistent remedies. So, there the declaratory judgment plaintiffs actually would be prejudiced. It was not just an issue of whether or not they are liable for past damages, past conduct.

THE COURT: Don't I have a danger of piecemeal litigation here if I wait until after the Circuit Court's decision and then have a delayed onset of opt-out litigation?

MR. MALONE: No, your Honor. In Kidder Peabody, there's danger of piecemeal litigation with respect to those very parties, the identical parties. Here, there's no other litigation that the declaratory judgment defendants are engaged in against the declaratory judgment plaintiffs.

And they could easily be unfolded in the same discovery once the Second Circuit decides getting back to a question your Honor raised previously about the expected duration. If you want to use the Visa Check case as a benchmark, that took approximately two years in the appeal process.

THE COURT: Which one, the class cert. or the

approved?

MR. MALONE: I believe the approved, your Honor.

With respect to the prejudice, your Honor, it's very revealing just now counsel revealed no real prejudice to the declaratory judgment plaintiffs if there is a stay here. The ongoing discovery that the parties are engaged in in the opt-out cases can easily encompass the declaratory judgment defendants if they actually decide to sue, and there is no definite decision that there would be suing contrary to what counsel said. We think at the very least, a stay would be appropriate here, and there would be no prejudice to the declaratory judgment plaintiffs.

Thank you, your Honor.

THE COURT: Thank you.

Did you want to be heard, sir?

MR. BENNETT: Jim Bennett again for Walmart.

The reference was made to the cases that talk about how sometimes a declaratory judgment is easier when the conduct is in the past. But in those cases, there's still ongoing future damages that are accruing during that time period, where the plaintiff who is a declaratory judgment plaintiff could get the ruling and change their conduct and cut that off.

So here, we both have conduct in the past and damages that are cut off, and those are the two circumstances

that we think are most significant. As the Court knows, we're not class representatives in the second class action, and the last time we sued these people here was in 1996. We have decided we like the Western District of Arkansas for this case, where we live, work and incurred our damages. Thank you.

THE COURT: Thank you.

Perfect. Five to 1:00.

I'm going to rule orally on most, if not all, of what I have heard argument on already, but I'll do that after the lunch hour, and then we'll proceed to the other matters that are on the table today.

So, I'll see you at 2:00 o'clock. Thank you.

(Lunch recess.)

A F T E R N O O N S E S S I O N

THE COURT: Please be seated.

The motions to dismiss the opt-out complaints are denied. In large part, my decision on these motions is driven by the procedural posture of the cases. The requirement that I accept all well-pleaded factual allegations as true exists on motions to dismiss.

It's fair to say that most of the arguments I reject here today may need to be revisited if there are dispositive motions at the conclusion of discovery.

Briefly -- and thank you again for your advocacy, all of you. As always, briefs are wonderful, and, if ever this series of cases goes away, I'm going to miss them, because the advocacy really is inspiring in some ways.

Briefly, to the extent the motions are based on the IPO's, the Visa and MasterCard IPO's, I'm going to spare you the applicable legal standards. You know them, and I'll use some terminology here that has become part of the vernacular of the case, because you all know it.

But with respect to the IPO's, I agree with the plaintiffs' argument that the allegations that the defendants didn't withdraw from the illegal concerted activity and that the IPO's left intact anticompetitive restraints plausibly allege a violation of the antitrust laws. I don't think the defendants' arguments can be resolved on a motion to dismiss

in this regard.

The same is true with regard to the Illinois Brick argument. I agree with a number of arguments overlap. For example, I agree with the target plaintiffs that the factual allegations that the merchants actually paid the interchange fees that they claim were fixed precludes my granting the motion at this point. I accept those allegations as true. They are sufficient to fend off the Illinois Brick claim, at least at this stage.

I don't need to address the other aspects of the arguments at this point, including, for example, whether or not the exceptions to the Illinois Brick doctrine are applicable.

As to the Buffalo Broadcasting argument, again, at this stage, the argument has no merit. The allegations here distinguish the default interchange from the blanket license at issue in those cases -- in that case.

Plaintiffs here allege that default interchange is one feature of the landscape that also includes the honor-all-cards rule, the antisteering rules, and that, viewed in its entirety, that landscape makes an agreed-upon super-competitive fee, and that the banks have no incentive to negotiate a different one. The Circuit City plaintiffs say, at page eleven of their brief, that this argument is premature on a motion to dismiss, and I agree with that. It's denied

for that reason.

As for the release, I agree with the 7-Eleven plaintiffs' argument, page 16 of their brief, that determining whether the release applies to all of the allegations involves a fact-intensive inquiry that can't be performed at this juncture on a motion to dismiss. There's many allegations of post-2003 conduct. I don't need to address the other aspects of this category of the argument, either.

As for the filed-rate doctrine argument, I conclude that that doctrine is inapplicable for the reasons set forth in the target plaintiffs' brief.

I have considered all the arguments in support of the motions to dismiss those opt-out complaints and find none of them to have merit. The motions are denied in their entirety.

I'm also denying the motions to dismiss the declaratory actions. Walmart contends that the case seeks a declaration of nonliability for past conduct and for damages that accrued in the past. Even accepting that characterization as true, it doesn't mean the use of the Declaratory Judgment Act is improper. The Wright, Miller and Kane treatise is instructive. It says, at Section 3751, that the declaratory judgment remedy "...gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which

either party may seek a coercive remedy, and, in cases in which a party who could sue for coercive relief, has not yet done so." That latter use of the Declaratory Judgment Act is squarely at issue before me.

In the same section, the treatise states: "The remedy made available by the Declaratory Judgment Act and Rule 57 is intended to minimize the danger of avoidable loss and the unnecessary accrual of damages and to afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action after the damage has accrued."

It goes on to talk about relieving potential defendants of the Damoclean threat of litigation which a harassing adversary might brandish while initiating suit at his leisure or never. There's no harassing adversaries here. Everyone here is of the able and nonharassing sort. But the principle applies nonetheless. In my view, the Declaratory Judgment Act affords a mechanism by which these declaratory judgment plaintiffs can litigate now an actual controversy.

The trade associations and retailers claim there is no controversy. But, of course, there is. In fact, they've been involved in it for a number of years. Of course, there's a controversy. Of course, there's subject matter jurisdiction.

It's also true that whether or not a declaratory

judgment action should proceed even when there's subject matter jurisdiction is left to the discretion of the district court. And among the factors I should consider in determining whether to exercise that discretion is whether the action would resolve the differences between the parties. Here, I think it's clear that it will, the inconvenience and burden to the litigants, and I see no meaningful inconvenience to the declaratory judgment defendants in litigating their actual controversy with Visa and MasterCard here in this forum.

I'm also instructed to consider whether there's been any inequitable conduct on the part of the declaratory judgment plaintiffs, and I see none here. So, I think the declaratory judgment action has been -- the Declaratory Judgment Act is properly invoked by these plaintiffs. I see no prejudice to the declaratory judgment plaintiffs, no meaningful prejudice to the declaratory judgment defendants, if the case proceeds. So, the application made in the alternative to stay is denied.

Who wants to be heard with regard to the motions to dismiss the Savelson claim complaint?

MR. LADNER: Your Honor, Mark Ladner, counsel for the Bank of America defendants. I will present argument this afternoon on behalf of all the Savelson defendants in support of our motion to dismiss the Savelson complaint. I'll try to be brief this afternoon, since we've been here a long time

already, and I think our papers do a pretty good job of setting out our argument.

Simply, the complaint should be dismissed because the plaintiffs lack any trust standing, and because their claims are barred by the Illinois Brick doctrine.

This is not the first time that consumers have brought antitrust cases alleging harm from rules of Visa and MasterCard. After the settlement of the Walmart case, more than twenty class actions were brought on behalf of consumers alleging violations of the antitrust laws. All of those cases were dismissed, because the courts found that any alleged harm to consumers was too indirect and attenuated to confer antitrust standing.

The same is true here. We start with that the plaintiffs acknowledge in their complaint that a relevant market is Visa and MasterCard credit and Debit Network Services. But the plaintiffs neither purchases network services or pay interchange fees, and thus are neither consumers or competitors in the network services market.

Plaintiffs in their complaint quote from the Visa rule. That's at paragraph 40 of the complaint, explaining the use and application of interchange fees. Interchange fees are set for Visa on the Visa system, and by MasterCard on the MasterCard system, and the Visa rule, which again is quoted verbatim in the complaint, describes interchange fees as

"transfer fees between financial institutions."

Acquirers compete in the network services market to provide a bundle of services to market -- to merchants, and charge merchants a discount fee for those services. On the other hand, consumers purchase goods from merchants using a credit card here or a debit card, and pay the price set by merchants.

Cardholders, the plaintiffs here, do not pay any additional transaction fee for those purchases. They pay the agreed price and no more, and that's it.

Based on the detailed description in the complaint about how card transactions actually work under Twombly, there's no plausible basis for plaintiffs' claim that they pay interchange directly. The Court need only draw reasonable inferences from the factual allegations in the complaint, and should not ignore the economic reality of how these transactions actually work.

And in addition, scattered throughout the complaint are references to the way the transactions actually work, which is, there are interchange fees or transfer fees between the acquiring bank and the issuing bank, and that the issuing bank retains the interchange fee from the purchase price.

So, what this means in the context of this motion is that the Court is free to question the plaintiffs' assertion that cardholders pay interchange.

Beyond that, their claims are hopelessly duplicative and really entirely duplicative of the claims of the merchants in this MDL, both the cases that have been settled and the existing opt-out cases that your Honor is obviously aware of.

They are seeking, these plaintiffs are seeking to recover the same interchange fees on the same transactions that are and have been the subject of the merchant suits. And beyond that, they have not suffered any antitrust injury, and that maybe is the most important part, probably in an effort to distant themselves from the Walmart follow-along class actions that were dismissed, because, as I said before, the harm was found to be too indirect and to remote.

There was in their opposition brief disclaimer of any reliances on a pass-through theory -- that's at page fourteen of their opposition brief -- and they therefore disavow any claim that there was any overcharge for the price they paid for the goods or services purchased with the payment card. Rather, they claim they paid inflated fees, but further claim that that did not result in an inflation of the price they paid for the goods or services. But without an alleged overcharge in the price paid for the goods or services, there is no antitrust injury and plaintiffs; therefore, lack of standing.

Just a moment on Illinois Brick, since your Honor knows more about Illinois Brick than probably all of your

colleagues on the bench at this point.

But this is a classic Illinois Brick case. We believe that we have a very strong argument, because the cardholders don't pay interchange. They are indirect purchasers, and their federal claims are therefore barred under the Illinois Brick doctrine. I'll reserve some time for rebuttal, if necessary.

THE COURT: Thank you.

Good afternoon.

MR. ALIOTO: Good afternoon, your Honor. May it please your Honor, my name is Joseph M. Alioto, and I was appointed interim co-lead counsel for the Savelson plaintiffs by Judge Orenstein. They are the plaintiffs who are the cardholders and/or consumers. The allegations or the motion to dismiss of course is based on 12(b)(6), and as the Court has already said, the Court must take the allegations to be true.

We have alleged all of the sufficient facts to show that there was in fact a combination and conspiracy among the defendant banks, and we've sued four banks. We have not sued Visa or MasterCard. We have alleged that they and the other banks are coconspirators.

We have alleged that the conspiracy -- how it was formed and the basic terms of the conspiracy and the adherence to it. I don't think that there's been really a challenge in

the Rule 12 motion to the violation or the allegations submitting the violation.

In addition, we have alleged that they have separately agreed to conceal, and to conceal the fact that there was an interchange rate and that it was by agreement among the different banks.

We have alleged, basically, your Honor, that there is only one payor, there is only one person, one group that paid anything, and the consumer, the cardholders, are the ones that paid it, and that it was concealed from them is not a defense by the defendants, and that the consumers, cardholders, did not know about it is not a defense, as the defendants just suggested.

In addition, I think -- and I would like to adopt, as a matter of fact, one of the statements your Honor made, that in fact the interchange is a hidden tax on the consumers. The Court mentioned that, and used that metaphor -- maybe it's not a metaphor. It's taxation, definitely without representation, but it is in fact a tax.

The Court also noted, I would like to respectfully submit, in your Honor's memo of December 2013, that the merchants should be leery of the situation of arguing to a jury, because it might very well be their view that they are the victims, they are the payors, they are the ones that paid. What did they pay? They paid the interchange agreement that

was fixed. Under antitrust injury, it's very clear, what is the type of injury that would flow from a price-fixing agreement? And that is high super-competitive prices, and that is the interchange rate itself. Who paid it? Who was the first payor? Who was the nonconspirator payor? The consumer is the one. The consumer is the victim of this conspiracy.

Certainly, the others were hurt, as well.

THE COURT: What others, the merchants?

MR. ALIOTO: There are certain values. That's different than price fixing and paying the super-competitive price.

THE COURT: I was wondering who the others were that you referred to.

MR. ALIOTO: Well, I believe that everyone in the stream. I believe that to some extent -- I believe that the merchants were hurt in terms of their own ability to be able to conduct their business, because what they were doing is, they were being forced to do a number of things that they otherwise would not have done in a free competitive society or market.

THE COURT: So, can they both recover, the merchants and the cardholders?

MR. ALIOTO: I don't know. That's an important question. But I think that in terms of Illinois Brick, in

terms of money paid, cash out of pocket, there's only one, and that's the consumer, and they paid it directly to the issuing banks who have agreed to this, and after they pay, then everybody cuts it up, and the issuing banks take their cut, the acquiring banks take their cut, and the remainder is given to the merchant. That's the way it works.

If we don't pay, doesn't work. So, we're the ones that are paying the hidden fee. And I believe that it is very clear, certainly taking the allegations to be true -- as a matter of fact, they cannot be disputed -- that there is only one payor, and we are it. We are certainly direct, because it goes right to the bank who fixed the price.

In addition, I think, your Honor, that I would like to just mention one thing, and that is that there is a perspective that the defendants have raised where they say there were these other class actions. And to some extent, your Honor, when you commented on what the jury might do, took the same view.

The jury might view it as a situation in which this has required the merchants to raise the prices on their products or their services, and if you analyze it from that perspective, you can see that courts might view it as being too remote, if you view it from that perspective, because then you would have to take a look at -- you would have to determine which part of the product or service that was bought

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caused the increase, if there be an increase. We don't have to do that, because we are the ones that did it. We put in our complaint -- we were very specific at page fifteen, your Honor.

These folks agreed. They published this price of what everybody's going to charge, the percentage. It starts at 2.7 percent of any purchase, and ten cents, by the way, and then subsequently, two years later, by 2010, they made it 2.950 plus ten cents, 2.95 percent. Okay. That is charged to whom? Only one person. Who pays it? We are it. Nobody else is paying anything.

If the perspective comes from the consumers and the jury that would be there, obviously, it is plain that the ones who are out-of-pocket, the ones who pay the cash, the ones who pay the money --

THE COURT: I get it.

MR. ALIOTO: Okay.

Now, in the absence of that, what we also did, your Honor, we went through associated contractors, general contractors, because that's the basic standing case by the Supreme Court. There was not really much that the defendants had to say about those particular criteria. But I would like to point out some of the things that they did not actually meet, and that is, that in going through the six criteria of the associated contractors, it asks for the nature of the

plaintiffs' alleged injury. We paid the fixed price. Okay.

It asks for the directness of the injury. Can't be more direct than taking it out of our pocket. They actually reached in and took it right out of our accounts. If we didn't have it -- it's kind of interesting. They have this immediate authorization. What does that mean? Do these guys have the money? If they have it, take it. If they don't have it, we might give them credit, but we'll get that back from them. They are going to pay it.

The third part was the speculative measure of harm. Here, it's very clear. They have given us the percentage that was published and adhered to. Everyone, as we allege, knew at that time that all other banks were doing it, because if they didn't do it, if all did not participate, it wouldn't work. And if it were not concealed, if it were revealed, it could be an item of negotiation, if not practically disappear.

There's some effort by them, as an excuse for this price fixing, that this was used to begin this combination.

I would like to say this, that Savelson himself, which, as I advised Judge Orenstein this morning, he's about ninety-four or ninety-five. He is the lead plaintiff. He was one of the architects of the system with MasterCard, and in the '60s and '70s. He was the one who came up with a lot of software that would make it work. Price fixing was not part of it at that time.

And so, what I'm trying to say here is that if there's an effort to see whether or not the damages are speculative, you cannot get a better measure than what they agreed that they were going to charge. And then once that is shown, and the fact of damage is, of course, that we paid, but once that is shown, the amount, then the burden goes to them, and under Eastman Kodak and Story Parchment.

The next one, your Honor, was the risk of duplicative recovery. This is not a hard one for us, your Honor.

THE COURT: Doesn't seem like anything is that hard for you.

MR. ALIOTO: I'm trying.

Anyway, that's fairly clear to us, and it's our separate case. I'm not going to suggest what the merchants should do, but I think that they do have avenues they should and could pursue. As a matter of fact, it might even be more than the so-called interchange rate itself.

The next one, your Honor --

THE COURT: Let's go back to that one. Isn't that one of the concerns that was expressed in Illinois Brick?

MR. ALIOTO: It was a concern, and that is the reason why they said whether it's a windfall or not, the first guy who pays is the guy who can sue. That's the answer. That's what they said was the answer.

Now, of course, there were twenty-four states that didn't agree with that, and they passed the so-called Illinois Brick repealer statutes and they said, Indirect or direct, and the Supreme Court said that was okay for them to do that.

But as far as Illinois Brick went, it's very strict and sometimes it's not right. This happens to be one of the occasions in which it is definitely right. Usually, one would think of manufacturers, and then the only ones who could sue would be their dealers. Dealers have no likelihood of suing their manufacturers, because they might be cut off.

In this case, there is every interest for the consumer cardholder to sue. As a matter of fact, your Honor, we cited in -- this is in our surreply, I believe -- we cited the Second Circuit case of the Publication Paper antitrust litigation on pages one and two. It's very interesting, because when the Court there was saying how price fixing agreements are conclusively presumed to be unreasonable and therefore illegal, then the Court says, Because such agreements are so likely to result in artificially higher prices being charged to -- because such agreements are so likely to result in artificially higher prices being charged to consumers without accomplishing any legitimate business purpose.

If there were a legitimate business purpose, certainly they would tell the people that are paying it, but

they actually agreed to conceal it and hide it, as this Court, in my opinion, properly characterized as a hidden tax on the consumers.

The cites --

THE COURT: The application of Illinois Brick operates to whose disadvantage in this chain? Who loses their claim? Obviously, not the cardholder, in your view. The merchant?

MR. ALIOTO: Everyone who comes after the first purchaser. That's the Illinois Brick, so.

THE COURT: The merchants are out of the box, because they are the purchaser?

MR. ALIOTO: That's Illinois Brick.

THE COURT: You're not saying they are indirect, you are saying they are not purchasers?

MR. ALIOTO: I'm saying that they are not the direct payors. The language sometimes is used as the payor, who pays. There's only one person who pays.

THE COURT: You are saying the merchants are the indirect payors and they are the ones whose ox is gored by Illinois Brick?

MR. ALIOTO: First of all, I think in this case, I believe that the merchants are not completely out of the situation, because sometimes Illinois Brick has a -- it has a very bad result and seemingly unfair result. A lot of

merchants were under a lot of restrictions, and the valuation of their businesses and the lost profits of their businesses are, in my opinion, substantial and have been substantially affected by this conspiracy, even though they are not the interchange payors. But it's a different kind of damage. It's a value damage. It's different. It's not the overcharge.

According to Illinois Brick, the overcharge are the people who first pay it.

THE COURT: Okay.

MR. ALIOTO: Thank you very much, your Honor.

THE COURT: Thank you.

MR. ALIOTO: Unless your Honor has any further questions.

THE COURT: I don't at this time.

MR. ALIOTO: I would say that they have also filed a motion against us for taking judicial notice. Mr. Winters, my co-lead counsel, is going to address that. And also I believe that -- they have not argued it. I don't know. Maybe they have dropped it, your Honor. Also, one of them was claiming lack of personal jurisdiction, and Mr. Winters was also going to argue that. Neither of those have been argued, apparently.

THE COURT: The fact that it's not orally argued doesn't constitute an abandonment.

MR. ALIOTO: There's nothing to rebut, I suppose, at

the moment.

THE COURT: I understand.

Thank you, Mr. Alioto.

You must be Mr. Winters.

MR. WINTERS: Yes, your Honor.

THE COURT: Good afternoon.

MR. WINTERS: Good afternoon. I would just simply say that there had been a request for judicial notice of the settlement agreement in the merchants' case. We believe it's not relevant in the first place. But in the second place, Federal Rule of Evidence 408 probably would not permit that document to be admitted.

What we are really getting down to is the issue of duplicative stuff. The question is legal liability, and the settlement doesn't establish that the merchants had legal liability of any kind, and I think your Honor pretty well spelled that out. So, that's pretty much our point. Thank you.

THE COURT: Thank you, Mr. Winters.

MR. LADNER: We have nothing to add.

THE COURT: All right.

I'm going to take that motion under advisement.

Thank you for your argument.

I think that disposes of the oral argument on the motions. There's some other issues we need to address: The

opt-in procedure regarding third-party claims filers and this dust-up regarding franchisors or franchisees.

Anybody want to talk about any of those things?

MR. MONTAGUE: Laddie Montague.

THE COURT: Good afternoon.

MR. MONTAGUE: Good afternoon, your Honor. I'll address the opt-in issue and where we are with that.

I think that the defendants and the class plaintiffs are in agreement that we ought to pursue that, number one. Number two is, the class plaintiffs have undertaken to draft a form of notice which we have not shared with the defendants yet, and we're happy to do that. I think it's almost final, in our state of mind. Third is, we really haven't decided or determined amongst ourselves what to recommend as to when that should happen.

THE COURT: That was one of my questions.

MR. MONTAGUE: That's probably the toughest issue that we have. The question is, whether we put that into motion before the appeal is filed or after the appeal is determined. I don't have an answer to that yet.

THE COURT: All right. In the first instance, I think you and the defendants are probably in the best position to make a proposal in that. I would benefit very much from your collective wisdom on that. So, I await the outcome of your discussions on it.

MR. MONTAGUE: That's the status of that.

THE COURT: Okay. This would be a notice to the people who filed opt-outs, the merchants who filed opt-outs, to give them an opportunity to opt back in.

MR. MONTAGUE: I think it's something like seven thousand, somewhere around seven thousand, and that would not include -- excluded from that would be those opt-outs who have filed litigation.

THE COURT: Sounds right.

MR. MONTAGUE: I suppose -- we did get a request from the opt-out counsel that they be involved in the procedure, and I think our position is, we would be happy to serve them with a copy of the notice. We really don't want them in the consultations as to how we reach our decision.

THE COURT: I understand.

Before I approve anything, I'll certainly -- we'll deal with who has what sort of standing to address this issue if and when I need to. But before I do anything, I'll give an opportunity to anyone to be heard on what I'm going to order in that regard.

I do want to set a date. I'll hear you on what that date ought to be, so we structure this, a date for you to report back to me, and hopefully with a proposed notice to these folks who opted out. What makes sense in terms of how much time should pass?

MR. MONTAGUE: The next status conference before Judge Orenstein is September 23.

THE COURT: That's fine my me.

MR. VIZAS: That's fine by us, assuming we get -- we do need to see the proposal.

THE COURT: You're taking a tough stand on that. Why don't we add that to the list of things that would be on the agenda for September 23? I don't mean to suggest something other than something in writing to me for that date.

Thank you.

What else? What's happening with the third-party claims filers? I know you are awaiting decisions from me. Are we still in the post-hearing briefing?

MS. BERNAY: Alexandra Bernay.

Your Honor, we have already had all the briefing for all the hearings that we've actually had. You postponed without a date the hearing for Manor Capital, and you stated that you were considering perhaps appointing the special master.

THE COURT: Yes.

MS. BERNAY: In the meantime, we're continuing to monitor, we actually sent out three new letters. One, we have actually met with their counsel. We have sent out some document requests. The other, we have had some preliminary

discussions with their counsel. And third, we have not yet heard back from them. We are still getting calls from the class administrator. They have slowed down dramatically. We think that's because of the disclaimers that your Honor has required. We've gotten about ten calls in the past month. That's significantly less.

THE COURT: Good.

MS. BERNAY: We are awaiting some rulings from your Honor. If there's a need to schedule these additional three hearings, we would do so.

THE COURT: Good.

And stay on the case, please. It's very important to the class and, for that reason, it's important to me.

It's my expectation to get you some rulings that I hope will provide if not a blueprint, at least some guidance to the special master for any evidentiary hearings that are referred to her.

MS. BERNAY: Great.

I also have a very brief report on the data that Visa and MasterCard were to provide. So, they did provide us some data. Epic has looked at that. They have informed me that looking at that data, they don't have quite enough information to be able to calculate and validate the default interchange payment amount, and it's also currently not sufficient to use in a claims process. But we've spoken to

Visa and MasterCard counsel, and we're in discussions now, and I think any issues regarding that data are going to be worked out, probably in time for the next status conference, to give you a better report.

THE COURT: Okay. Good.

MS. BERNAY: Thank you, your Honor.

THE COURT: Nice to see you as always.

There's a franchisor/franchisee.

MR. VIZAS: Briefly, your Honor. We discussed that. We have been discussing it with class plaintiffs. It's a problem that we all agree has arisen, and we're trying to develop to see if there's something we can do to bring something to the Court by the September 23 date. We're in discussions, and we talked to Judge Orenstein this morning, and we hope to have a written submission before the 23rd. We think there's something the Court might be able to do.

THE COURT: Good. Sounds like something you are working on and I need not pay attention to it at the moment.

MR. VIZAS: I don't think today, but we'll be back in September.

THE COURT: Good.

What else, if anything, that anybody wants to address before we adjourn?

I take that as a nothing.

As always, it's great to see the old faces, and nice

to see some new ones, as well. Have a good day, everyone, and a nice weekend.

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